ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL DECISIONS

TRIBUNAL DECISIONS

1991

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL DECISIONS

1991

File No.	Date	Type and Disposition	Indexed
T/0011/91	Aug. 2/91	Settlement	No
T/0013/91	Feb. 17/92	Settlement	No
T/0014/91	Mar. 3/92	Unfair Labour Practice?; Dismissed	Yes
T/0017/91	Oct. 22/92	Unfair Labour Practice; Dismissed	Yes
T/0018/91 - see T/0011/91			
T/0019/91 - see T/0013/91			
T/0025/91	Jan. 23/92	Certification; Preliminary	Yes
T/0027/91 - see T/0013/91			
T/0033/91-2	Feb. 25/92	Certification; Allowed	No
T/0036/91	Jan. 28/92	Religious Objection; Allowed	Yes
T/0038/91	Dec. 17/91	Settlement	No
T/0045/91-1	Apr. 8/91	Certification/Employee Status; Preliminary	Yes
T/0045/91-2	Aug. 17/93	Certification; Allowed	No
T/0051/91	Mar. 3/92	Certification; Allowed	No

File No.	Date	Type and Disposition	Indexed
T/0052/91	Feb. 25/92	Certification; Allowed	No
T/0059/91-1	Jan. 19/93	Employee Status; Preliminary	Yes
T/0059/91-2	Jan. 29/93	Settlement	No
T/0064/91-1	Apr. 3/92	Certification; Interim	No
T/0064/91-2	May 19/92	Certification; Dismissed	No
T/0065/91	May 19/92	Certification; Dismissed	No
T/0068/91-1	Aug. 17/92	Certification; Preliminary	Yes
T/0068/91-2	Feb. 17/93	Certification; Allowed	No
T/0068/91-3	June 10/93	Certification; Allowed	No
T/0069/91-1	Jan. 13/93	Certification/ Employee Status; Allowed	Yes
T/0069/91-2	Feb. 9/93	Certification; Allowed	No
T/0071/91	June 10/92	Duty of Fair Representation; Dismissed	Yes
T/0074/91-1	June 10/92	Certification/ Employee Status; Preliminary	No
T/0074/91-2	Mar. 31/93	Certification; Allowed	No
T/0085/91	May 5/93	Duty of Fair Representation; Dismissed	Yes
T/0088/91	Oct. 15/92	Settlement	No
T/0093/91	June 22/92	Certification; Allowed	No

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180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8
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T/11/91, T/18/91

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union
and its Local 321

Applicant

- and -

The Crown in Right of Ontario
(Ministry of Community & Social Services)
and its agent B. Lovering

Respondent

BEFORE:	J. Stanley	Chairperson
	M. Sullivan	Member
	W. Madigan	Member

FOR THE APPLICANT:
R. Wells
Counsel
Gowling, Stathy & Henderson
Barristers & Solicitors

FOR THE RESPONDENT:
B. Lovering
Administrator
Adult Occupational Centre
Ministry of Community & Social Services

T/11/91
T/18/91

TRIBUNAL ORDER

Enclosed is a Memorandum of Agreement which the parties agreed would be made an Order of the Tribunal.

DATED at Toronto, this 2nd day of August, 1991.

D. Stanley, Chairperson

M. Sullivan, Member

W. Madigan, Member

MEMORANDUM OF AGREEMENT

The Ministry of Community and Social Services and members of the Ontario Public Service Employee Union, Local 321, have reached an agreement which resolves all complaints placed before the Labour Relations Tribunal (T/0011/91 and T/0018/91).

The parties will execute the undertakings set out below:

1. A letter signed by the Regional Director of the Ministry of Community and Social Services to the Union, (attached) to be posted throughout the facility.

2. A letter from the Administrator of the Adult Occupational Centre, Edgar to the Union, (attached) to be posted throughout the facility.

3. The Regional Director of the Ministry of Community and Social Services, or designate at the Area Manager level, will attend future meetings requiring Deputy Minister or third party involvement. This undertaking to be for a period of one year from the date of signature on this Memorandum of Agreement.

4. The Regional Director, or Ron Murray as designate, will attend all meetings of the E.R.C. for a period of one year from the date of signature on this memorandum of Agreement.

5. Margaret Gallow representing the Ministry and Lillian Stevens, representing the Union, will meet periodically throughout this period of one year beginning in November 1991 to review the processes indicated in points 3 and 4 above.

6. The Ministry will provide opportunities for training in Labour Relations at Adult Occupational Centre, Edgar for all management staff.

7. The Union will withdraw all complaints currently before the Labour Relations Tribunal in applications T/0011/91 and T/0018/91.

8. The parities agree that this memorandum of Settlement be made an order of the Labour Relations Tribunal.

For the Ministry (COMSOC)

Regional, Director, COMSOC

For the Union (Local 321 O.P.S.E.U.)

Staff Representative, O.P.S.E.U.

Administrator, A.O.C., Edgar

President, Local 321, O.P.S.E.U.

Ministry of Community and Social Services
Ontario

Ministère des Services sociaux et communautaires

Central Regional Office
Bureau régional du Centre

2195 Yonge Street
10th Floor
Toronto, Ontario
M7A 1G2

2195, rue Yonge
10e étage
Toronto (Ontario)
M7A 1G2

TO: ALL STAFF
Adult Occupational Centre,
Edgar

FROM: Bernice Lovering
Administrator
Adult Occupational Centre,
Edgar

DATE: July 29, 1991

The management of Adult Occupational Centre, Edgar regrets the incident that occurred over the staff use of the community hall at Edgar on May 29, 1991.

I was not informed of the purpose of the meeting nor of the fact that certain staff members distributed a memo by internal mail requesting staff's attendance at the May 29 meeting for the purpose of discussing the actions of Local 321 Executive. If other management staff at Edgar were aware of the purpose of the meeting, they did not bring this to my attention.

As a Senior Manager with the Ministry of Community and Social Services, I support the Ministry's position in regard to open an effective communication with our Local Union Executive. I have not and will not condone anti-union activities.

I regret that delays in resolving the situation regarding Mr. Don Reynolds have contributed to the anger of the membership of Local 321. I am committed to working with Local 321 Executive to improve labour relations in the future.

B. Lovering

Bernice Lovering

Ministry of Community and Social Services
Ministère des Services sociaux et communautaires

Central Regional Office
Bureau régional du Centre

2195 Yonge Street
10th Floor
Toronto, Ontario
M7A 1G2

2195, rue Yonge
10e étage
Toronto (Ontario)
M7A 1G2

TO: ALL STAFF
Adult Occupational Centre,
Edgar

FROM: Margaret Gallow
Regional Director
Central Region

DATE: July 29, 1991

On February 22, Mr. Don Reynolds, Director, Residential Services, Adult Occupational Centre, Edgar, sent a memo to all staff in response to a concern tabled at the E.E.R.C. meeting in January 1991. Mr. Reynolds should at the time, have been aware that the response to all staff was improper and should have been through the regularly established process of E.E.R.C. Subsequently, actions and decisions taken by Senior Management of the Ministry in regards to Mr. Reynolds were solely the employers decisions and not in response to a request from Local 321 Executive.

Senior Management in this Ministry regrets that failure to communicate their actions in respect to Mr. Reynolds have caused undue hardship and embarrassment within the membership of Local 321 and their Executive, and regrets the division and dissention this may have caused to the membership of Local 321 and its Executive.

The Management of Adult Occupational Centre, Edgar will make every attempt to ensure that future actions will not cause interference in the relationships between the Local Executive and its members and assures the Local that it recognizes that the President is the elected spokesperson for Local 321.

M. Gallow

Margaret Gallow

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T/13/91, T/19/91, T/27/91

IN THE MATTER OF A COMPLAINT

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

BETWEEN

Ontario Public Service Employees Union

Complainant

- and -

The Crown in Right of Ontario
(Ministry of Health)
and Lewis Bradford Ambulance Service Ltd.

Respondent

BEFORE:	G. McKenchnie	Vice-Chairperson
	M. Sullivan	Member
	B. Gallivan	Member
FOR THE COMPLAINANT	I. Roland Counsel Gowling, Strathy & Henderson Barristers & Solicitors	
FOR THE RESPONDENT	S. Robinson Lewis Bradford Ambulance Service Ltd.	

T/13/91, T/19/91, T/27/91

TRIBUNAL ORDER

Enclosed is a Memorandum of Agreement which the parties agreed would be made an Order of the Tribunal.

DATED at Toronto, this 17 day of February, 1992.

G. McKechnie, Chair

M. Sullivan, Member

B. Gallivan, Member

Tribunal File No: T/0013/91
T/0019/91
T/0027/91

CROWN EMPLOYEES' COLLECTIVE BARGAINING ACT

B E T W E E N:

ONTARIO PUBLIC SERVICE EMPLOYEES' UNION

Complainant

- and -

THE CROWN IN RIGHT OF ONTARIO as represented by the Ministry of Health and LEWIS AMBULANCE SERVICES LTD.

Respondents

MEMORANDUM OF SETTLEMENT

The parties, The Ontario Public Service Employee's Union ("OPSEU") and Lewis Ambulance Services Ltd., agree to settle the complaints (T/0013/91, T/0019/91, T/0027/91) filed with the Tribunal and this Memorandum of Settlement ("Settlement") supersedes any prior agreement on the following terms:

(1) The present full-time schedule, seven (7) week cycle, (Appendix "C" attached) shall continue until replaced by a mutual agreement as soon as possible. The replacement schedule must have the supervisor working a minimum of four (4) day shifts, Monday to Friday, forty (40) hours on average per week. This must also include the current management shifts. This new replacement schedule shall give full-time ambulance attendants an average work week of forty (40) hours and will stay in effect until December 31, 1991.

IK agreed upon schedule.

(2) Offers of shifts to part-time employees shall be in accordance with past practice prior to May 15, 1991. Past practice means that shifts are offered to part-time employees by seniority.

(3) The April 22, 1991 memorandum RE: Rest Period is amended and clarified as follows:

(a) After base duties are completed, the night shift attendants may rest (lie down) but must remain in uniform (they may remove their shoes).

(b) Any resting by staff as set out in (a) shall not detrimentally affect response time.

(c) In reporting response time, the attendant shall use the cellular telephone in the vehicle, if necessary.

(d) Base duties referred to in (a) include necessary cleaning of the ambulance vehicle.

(4) The two (2) day suspension of Alan Perry for *"insubordination"* has been reduced to a one (1) day suspension without pay. Alan Perry will be compensated for the one (1) day he has not been paid while on suspension. - JR.

(5) Simon Torr was hired May 15, 1991 as a full-time ambulance attendant and will be reinstated as a full-time attendant as of October 1, 1991. To date, he has completed three (3) months and one and one half (1½) weeks of his six (6) month probation period. The remaining balance of the three (3) months will begin as of the date of his reinstatement.

(6) Simon Torr will be compensated on a *"without prejudice basis"* for the five (5) days (August 9-14, 1991) he was out sick due to *"stress"*. However, further sick leave benefits will not be available to Mr. Torr until the balance of his probation period is completed. Payment of this forty (40) hour period will be made on the next pay day, October 3, 1991.

(7) Simon Torr's ~~record of~~ dismissal for cause will be rescinded and his record will be replaced with a first time written warning for insubordination. In addition, the employer shall send a letter to U.I.C. (attached as Appendix "B") explaining the Simon Torr situation. In the event that U.I.C. requests a change to Simon Torr's Record of Employment, the employer will do so as soon as possible, and provide a copy to Simon Torr.

(8) The new *"shift change"* policy as outlined in Bev Robinson's August 1, 1991 memorandum will be rescinded. Subject to collective agreement negotiations, the old shift change policy of *"three (3) days notice"* will be reinstated. This policy will be strictly followed and enforced.

(9) The employer acknowledges that the employees are free to engage in activities pursuant to the *Crown Employees Collective Bargaining Act*, such rights including joining a trade union and participating in its lawful activities. For purposes of greater clarity, statements made by the employer and its representatives are not, and were not intended and should not be interpreted as intending to interfere with the employees' rights under the *Act*.

(10) This Settlement is not an acknowledgement or admission by the employer of any violation of the *Crown Employees Collective Bargaining Act*.

(11) The parties are aware that the Tribunal has issued a decision dated September 26, 1991, that OPSEU has the representation rights for the ambulance attendants employed at Lewis Ambulance Services Ltd., Bradford, Ontario. The parties agree to the provisions of the Settlement between OPSEU and the Participating Ambulance Operators, dated February 13, 1991, a copy of which is attached hereto as Appendix "A", which Settlement shall apply from September 26, 1991 in accordance with its terms, subject to ratification by the members of the Bargaining Unit, and subject to approval of funding by the Ministry of Health. For further clarity:

(a) The Settlement is effective for the period September 26, 1991 to December 31, 1991 at which time the agreement expires as set out in Appendix 2, paragraph 6 of the Settlement.

(b) The local issues outstanding for the period September 26, 1991 to December 31, 1991 shall be bargained by the parties but in the event the agreement is not reached by the parties before bargaining begins with respect of the 1992 agreement (which bargaining shall be carried on with the OPSEU central bargaining), the local

issues shall be dealt with as part of the 1992 bargaining only. Failure to reach agreement on local issues for the period September 26, 1991 to December 31, 1991 shall not affect the parties' obligations with respect to the central issues in the Settlement.

(c) The local issues shall include an increase in salaries, if any, as provided by the Ministry of Health as part of the normal budget process from the period of April 1, 1991 to the date that the Settlement applies to this agreement.

(12) This agreement constitutes a full and final settlement of Union Applications T/0013/91, T/0019/91, T/0027/91 and shall be made a decision of the Tribunal.

DATED at Toronto this 26th day of September, 1991.

LEWIS AMBULANCE SERVICES LTD.

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

MEMORANDUM OF SETTLEMENT

B E T W E E N:

PARTICIPATING AMBULANCE OPERATORS

(See Appendix I)

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

Subject to the resolution of local issues, the bargaining representatives of both parties agree to recommend to their respective principals the following terms and conditions of employment as full and final resolution of "central" issues.

1. The respective collective agreements shall be adjusted in accordance with the terms and conditions set out in Appendix 2, including the letter of understanding re dispute resolution

2. Nothing shall be retroactive prior to the date of ratification except as specifically indicated in the memorandum of settlement on central issues or the memorandum of settlement on local issues.

DATED this 13th day of February, 1991

For OPSEU:

For Ambulance Operators
referred to in Appendix I.

APPENDIX I - PARTICIPATING AMBULANCE OPERATORS

Lambton Middlesex

Thames Valley

Woodstock

Halton-Mississauga

Royal City - Guelph

Lee

Port Colborne District

Greens

Royal City - Fergus

Owen Sound

Danver

Fleetwood

Superior

Uxbridge Stouffville

Lakeshore

McKechnie

Alan R. Barker

B.D. Powell

Rock Lands

Quinte

Appendix 2

[redacted]6

1. Identification of Employer

Name of parties to agreement to remain the same.

2. Application of CECBA

See Letter of Understanding.

3. Wage Scales

(a) 1989 Rates for Operators without contracts in effect between April 1, 1989 and April 1, 1990:

Full Time/Part Time rates

Lambton Middlesex Thames Valley Lee Port Colborne Owen Sound Uxbridge B & D Powell	effective April 1, 1989 6.5% over 1988/89 rates (all steps on grid)

(b) 1990 rates

effective on day following expiry of contract in 1990, (effective April 1, 1990 for contracts expired in 1989 and for Greens).

Full Time Ambulance Officer

start	15.46
1 year	15.82
2 years	16.29

effective July 1, 1990

start	15.98
1 year	16.34
2 years	16.81

effective April 1 1991

start	16.90
1 year	17.28
2 years	17.78

Part Time Ambulance Officer

15.46

effective ~~October~~ JULY 1, 1990

15.98

effective April 1, 1991

16.90

4. Shift Premium:-

Effective on date following expiry of Collective Agreement in 1990 and April 1, 1990 for contracts expired in 1989, amend to read:

per OPS Article 11.1 to 11.4

5. ALS

If, during the life of this Agreement, the allowances and entitlements for employees concerning Advanced Life Support (ALS) are increased or improved for Ambulance officers in the Ontario Public Service, the same allowances and entitlements shall apply to employees under this Agreement on the same date.

6. Agreement to expire December 31, 1991.

7. Letter of Understanding

Operators and their supervisory staff will be able to continue their ~~current~~ existing practices of performing bargaining unit work.

8. It is understood that any agreement on central issues is conditional on agreement on all outstanding terms of the Collective Agreement. Either party may amend their position concerning central issues failing resolution on all outstanding local issues and the prior position of the parties on central issues shall not be referred to or relied upon by the other party in any way.

9. Clause to be included in Memorandum of Settlement:

"It is understood and agreed that the "central bargaining process" utilized in negotiating this Collective Agreement is entirely without prejudice and will not establish a precedent for future negotiations between the parties including the renewal of this collective agreement and will not be relied upon as doing so by either party.

10. Retroactivity

Retroactive pay shall include all wage increases payable from the date indicated, on hours worked, prorated for employees who were hired or severed employment during such periods. All such payments shall be provided to employees currently on the payroll within ninety (90) days of notice of ratification of the collective agreement by the union. Employees not on current payroll shall be contacted, ~~in writing~~ by registered mail, at their last known address to advise them of their entitlement. They shall have a period of thirty days after the mailing of the letter in which to claim the monies, and not thereafter. A list of those employees not on the current payroll shall be copied to the chief steward.

The employer shall endeavour to provide such payments

and for those who may have severed interim increases

60 day however

LETTER OF UNDERSTANDING

CONCERNING DISPUTE RESOLUTION

1. Without prejudice to any claim either party may make in the future with respect to what legislation governs the collective bargaining relationship between the employer and the union, the parties agree, for the duration of the Collective Agreement and during the negotiations for its renewal, that:

(a) Grievances filed on or after April 12, 1990, processed in accordance with the grievance procedure in the Collective Agreement, shall be referred to the Grievance Settlement Board for resolution. The Board will have exclusive jurisdiction to arbitrate the grievances and will be entitled to exercise its powers pursuant to the Crown Employees' Collective Bargaining Act as if the parties were covered by that Act.

(b) Matters arising on or after April 12, 1990 which would fall within the jurisdiction of the Ontario Public Service Labour Relations Tribunal, were the parties covered by the Crown Employees' Collective Bargaining Act, shall be referred to that Tribunal

for resolution. The Tribunal will be entitled to exercise its powers pursuant to the Crown Employees' Collective Bargaining Act as if the parties were covered by that Act.

(c) During the negotiation for the renewal of the Collective Agreement, the parties agree to be bound by the provisions of Section 8 through 13 and Sections 21, 22, 23 and 27 of the Crown Employees' Collective Bargaining Act. It is understood that an interest arbitrator appointed to resolve outstanding issues has no jurisdiction to impose interest arbitration on the parties for the next round of negotiations.

(d) It is understood that for the duration of the Letter of Understanding that OPSEU is the exclusive bargaining agent entitled to represent the employees in the bargaining unit.

2. This Letter of Understanding forms part of the Collective Agreement and shall remain in effect until the parties conclude the negotiation for the renewal of the Collective Agreement, at which time it will cease to apply

to the relationship between the parties except with respect to matters occurring while it was in effect.

3. This Letter of Understanding is without prejudice to the position of either party with respect to the applicability of the Crown Employees' Collective Bargaining Act to the bargaining relationship between the parties. It is understood that following its expiry, it will not be relied upon or referred to by either party in any further dealings or proceedings of any nature and kind between the parties.

DATED this day of 1991.

_____ _____

APPENDIX "B"

[COMPANY LETTERHEAD]

September 26, 1991

Record of Employment #--------
Social Insurance #---------

Unemployment Insurance Commission,

TO WHOM THIS MAY CONCERN

Re: Simon Torr

Attached is a photocopy of the Record of Employment originally prepared for Simon Torr on or about August 16, 1991. As can be seen from the Record of Employment, Simon Torr's reason for termination was he was fired.

A brief history of this firing may prove helpful. As of August 5, 1991, Simon Torr was given a three (3) week notice of lay-off to be effective August 29, 1991. On August 15, 1991, two (2) weeks prior to lay-off, Simon Torr was fired for insubordination. Accordingly, we, the employer, filled in "fired" on Simon Torr's Record of Employment as the ultimate reason for termination of employment.

As of September 26, 1991, the attached Memorandum of Settlement reinstates Simon Torr as of October lst, 1991. Simon Torr's dismissal for cause has been rescinded and his record has been replaced with a first time written warning for insubordination. The Unemployment Insurance Commission may now consider this an August 15, 1991 lay-off with an October 1, 1991 recall date. If a new or amended record of employment is required, please advise as soon as possible.

Thank you for your co-operation in this matter. We look forward to hearing from you at your earliest convenience.

Yours truly,

Bev Robinson
Lewis Ambulance Services Ltd., Bradford

	M	T	W	T	F	S	S
1.	(A)S (C) 1 (B)4 2 5	S 1 4 2 5	7 3 1 2	S 7 6 3	S 7 6 4	1 2 3 4	1 (D) 2 3 (E) 4
2.	S 5 1 6 2	S 5 1 6 2	4 7 5 6	S 4 3 7	S 4 3 1	5 6 7 1	5 6 7 1
3.	S 2 5 3 6	S 2 5 3 6	1 4 2 3	S 1 7 4	S 1 7 5	2 3 4 5	2 3 4 5
4.	S 6 2 7 3	S 6 2 7 3	5 1 6 7	S 5 4 1	S 5 4 2	6 7 1 2	6 7 1 2
5.	S 3 6 4 7	S 3 6 4 7	2 5 4 3	S 2 1 5	S 2 1 6	3 4 5 6	3 4 5 6
6.	S 7 3 1 4	S 7 3 1 4	6 2 7 1	S 6 5 2	S 6 5 3	7 1 2 3	7 1 2 3
7.	S 4 7 5 1	S 4 7 5 1	3 6 4 5	S 3 2 6	S 3 2 7	4 5 6 7	4 5 6 7

1. BILL LANGFORD
2. JOE LUNDY
3. ALAN PERRY
4. ALISON BENNETT
5. MIKE HARGREAVES
6. SIMON TORR
7. DAVE HARGREAVES

S. SUPERVISOR

MONDAY & TUESDAY
8 HOUR SHIFTS
7AM-3PM (A)
3PM-11PM(B)
11pm-7AM(C)

WEDNESDAY TO SUNDAY
12 HOUR SHIFTS
7AM-7PM (D)
7PM-7AM (E)

Ontario Public Service Labour Relations Tribunal
Fonction Publique de l'Ontario Tribunal Administratif des Relations du Travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8

416/598-0688

Crown Employees Collective Bargaining Act
R.S.O. 1980, c. 108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

T/0014/91

BETWEEN:

Catherwood, Glenny, Spowart et al.
Ontario Public Service Employees Union

Complainants

- and -

The Crown in Right of Ontario
(Ministry of Government Services)

Respondent

BEFORE:	J.H. Devlin	Vice Chairperson
	P. O'Keeffe	Member
	R. Redford	Member
For the Individual Complainants:	James Glenny	
For the Union:	Jim Paul Grievance Officer Ontario Public Service Employees Union	
For the Respondent:	Craig Slater Senior Counsel Legal Services Branch Management Board of Cabinet	
Hearing:	November 4, 1991	

The complaint in this matter involves a claim that the individual complainants be reclassified as Real Estate Officers 3 (atypical). The complaint stems from two decisions of the Grievance Settlement Board which dealt with classification grievances filed by employees in the Real Estate Officer series. In both of these decisions, the Board issued Berry orders directing the Ministry to establish new classifications which would accurately reflect the Grievors' duties and responsibilities. As a result of these decisions, the Ministry established a new Real Estate Officer class series and the parties entered into discussions with respect to the appropriate salary range for the new classifications in accordance with Article 5.8 of the Collective Agreement. The individual complainants, who are also classified as Real Estate Officers, are of the view that this process has been unduly protracted and requested that the Tribunal intervene.

At the outset of the hearing on November 4, 1991, Mr. Glenny advised the Tribunal that Mr. Catherwood no longer wished to be a party to the complaint. Mr. Paul advised the Tribunal that the Union had been improperly named as a complainant and he requested that the Union be granted intervenor status.

Mr. Glenny then requested an adjournment of the hearing on the ground that he had been unable to contact Mr. Upshaw, the President of the Union, with whom he wished to discuss the complaint. Both Mr. Paul, on behalf of the Union, and Mr. Slater, on behalf of the Ministry, objected to the request for an adjournment and took the position that the complaint did not involve a matter which was the proper subject of a complaint before the Tribunal.

The essence of the complaint-concerns the delay which has occurred in the implementation of two decisions of the Grievance Settlement Board. This is a matter for the Grievance Settlement Board and not for the Tribunal and the Tribunal notes that the Board retained jurisdiction for purposes of implementation of its decisions. It is also of note that Section 19 of the Crown Employees Collective Bargaining Act deals expressly with the procedure to be followed in the enforcement of decisions of the Grievance Settlement Board.

In the result, the Tribunal delivered an oral decision at the hearing on November 4, 1991 denying the request for an adjournment and dismissing the complaint without prejudice to the right of the complainants to

refile the complaint once proceedings before the Grievance Settlement Board have been completed.

DATED AT TORONTO, this 3rd day of March, 1992.

Vice Chairperson

"P. O'Keeffe"
P. O'Keeffe - Member

"R. Redford"
R. Redford - Member

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T/0017/91

IN THE MATTER OF AN COMPLAINT

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Complainant

- and -

The Crown in Right of Ontario
as represented by the Ministry of Natural Resources

Respondent

BEFORE:	D. Stanley	Vice-Chairperson
	P. O'Keeffe	Member
	B. Gallivan	Member

FOR THE APPLICANT:
D. Wright
Counsel
Ryder, Whitaker, Wright & Chapman
Barristers & Solicitors

FOR THE RESPONDENT:
R. Filion
Counsel
Winkler, Filion & Wakely
Barristers & Solicitors

HEARING: June 19, 1992

This is a complaint filed by Ontario Public Service Employees Union, on behalf of Jeanette Desi, against the Ministry of Natural Resources, alleging that Ms. Desi has been dealt with in a manner contrary to s. 29(1), (2)(a) and (2)(c) of the *Crown Employees Collective Bargaining Act*. Those provisions read as follows:

> 29. (1) No person who is acting on behalf of the employer shall participate in or interfere with the selection formation or administration of an employee organization or the representation of employees by such an organization, but nothing in this section shall be deemed to deprive the employer or any person acting on behalf of the employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.
>
> 29. (2) The employer or any person acting on behalf of the employer shall not,
>
> (a) refuse to employ or to continue to employ or discriminate against a person with regard to employment or any term or condition of employment because the person is exercising any right under this Act or is or is not a member of an employee organization;

(b) impose any condition on an appointment or in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under this Act;

(c) seek by intimidation, by threat of dismissal or by any other kind of threat or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to become or refrain from becoming or to continue or to cease to be a member of an employee organization, or to refrain from exercising any other right under this Act; or

(d) refuse to employ or to continue to employ or discriminate against a person with regard to employment only because the person refused to make a contribution or expenditure to or on behalf of any political party or to or on behalf of a candidate for public office,

but no person shall be deemed to have contravened this subsection by reason of any act or thing done or omitted in relation to a person employed in a managerial or confidential capacity.

The form which is used by the complainant, Form 28, requires the complainant to set out the steps taken on behalf of the "grievor" for the adjustment of the matters giving rise to the complainant. They are set out in this case as follows:

(a) On or about July 21, 1989 the Complainant issued a memorandum to Mr. W. Cowan regarding the differential and pecuniary treatment of the complainant by her supervisor Mr. J. Botterill due to her position as President of Local 507 of OPSEU and her past exercising of her rights under the *Crown Employees Collective Bargaining Act* and the Collective Agreement. In this

Memorandum the Complainant requested an investigation into these pecuniary, malicious and discriminatory actions of Mr. J. Botterill.

(b) On or about February 26, 1990 the Complainant filed a grievance stating as follows "that my managers Bill Cowan and John Botterill have violated the *Crown Employees Collective Bargaining Act* by treating me with unjust discrimination and have also violated Article 18.1 of the Collective Agreement"

(c) On or about September 19, 1990 the Complainant filed a grievance stating as follows "that my managers Bill Cowan and John Botterill have violated the *Crown Employees Collective Bargaining Act* by treating me with unjust discrimination and have also violated Article 18.1 of the Collective Agreement"

At the hearing of the complaint counsel for the Employer made a preliminary objection based on the fact of the two grievances referred to in the application, and others, which counsel alleges were settled and withdrawn or which were referred to arbitration under the *Crown Employees Collective Bargaining Act* provisions and dismissed. Counsel argued that all the particulars of the complaint were raised in one or another of these several grievances and that to raise those particular issues in this complaint is an abuse of process.

The particulars of the complaint, set out in Form 28, dated June 3, 1991 are as follows:

1. On or about January 18, 1988 the complainant had a discussion with Ms. G. Perusini and Mr. John Botterill regarding the rate of accumulation of overtime. During this conversation the

complainant demanded compensation for her overtime as provided by Article 3.7 of the Collective Agreement. In response to the Complainant's demand, the Complainant was threatened by Mr. John Botterill. Specifically, Mr. Botterill stated that if the Complainant pursued her rights as provided under the collective agreement the Ministry would respond by changing the manner in which all staff were credited for doctor's appointments.

2. Since this threat by Mr. John Botterill on or about January 18, 1988 the Complainant has been the subject of discriminatory and harassing behaviour by Mr. Cowan and Mr. John Botterill and other supervisory staff at the Ministry of Natural Resources.

3. These actions are in direct retaliation for the Complainant's insistence on having her rights under the Collective Agreement respected and are a direct attempt to discourage and prevent the Complainant from exercising her right as granted by the Crown Employees Collective Bargaining Act.

4. Specifically, the following acts and omissions have been perpetrated by the Ministry:

   a) Since January 18, 1988 the Complainant has made several reasonable requests for overtime allowance or compensation time in order to complete her workload. These requests have been consistently refused by management. Other employees in the Complainant's department who have not had as great workloads have regularly been allowed overtime in order to complete their workload.

   b) On or about April 6, 1988 the Complainant participated in a job competition. The Complainant was unsuccessful in this job

competition based on malicious and inaccurate representations made by Mr. John Botterill.

c) From May 11 to May 30, 1988 the Complainant was away on vacation. When the Complainant returned to work on May 30 her desk had been moved to a different location. The new location of the desk posed serious health hazards to the Complainant given her previous medical history. The Complainant requested on several occasions to have her desk moved in order to prevent serious consequences to her health but Mr. John Botterill consistently refused to move her desk despite being fully aware of the potential health consequences to the complainant.

d) On or about September 21, 1988 the Complainant was subject to an unwarranted and harassing request for a doctor's certificate by Mr. Cowan. Such documentation is not required for other staff members in the Complainant's department and requiring this documentation is a violation of the Collective Agreement.

e) On or about November 28, 1988 the Complainant was requested to change her reporting time. From this date on the Complainant has been subjected to differential and discriminatory treatment regarding her reporting time as other staff at her department are not subject to the same rules and regulations.

f) On or about December 14, 1988 the Complainant was refused a reasonable request for a copy of Regulation 18(3) of the Ontario Manuel of Administration by Mr. Cowan. The Complainant's request for this information had been in her capacity as President of Local 507 and was rejected by her supervisors due to her position.

g) On or about April 21, 1989 the Complainant was subject to intimidating and harassing behaviour at a meeting with Mr. John Botterill and Ms. G. Perusini. During this interview the complainant was subject to unfair and malicious criticism despite the Ministry's knowledge that the Complainant was soon to undergo major surgery and was therefore vulnerable to such intimidation tactics.

h) On or about August 29, 1989 the Complainant was the subject of discriminatory and harassing behaviour by Mr. John Botterill

after her attendance at a Grievance Settlement Board hearing in her position as Union Steward;

i) On or about October 25, 1989 the Complainant was subject to derogatory and offensive remarks, and conduct at a stage 2 meeting held pursuant to the grievance procedure. This conduct was witnessed and condoned by Deputy Minister Designee, Mr. John Weekes;

j) On or about January 12, 1990 the Complainant was subject to threatening and malicious behaviour by Mr John Botterill after she had expressed her concerns regarding unequal treatment of staff in her department.

k) Since the Complainant"s attempted exercise of her rights under the Collective Agreement on January 18, 1988 and continuing until the present the complainant has been the subject of constant monitoring by the supervisors in her department. This monitoring includes continuous and harassing monitoring of her arrival and departure times and the time which she takes for lunch and other breaks. Other employees in her department are not subject to similar working conditions;

l) On or about February 2, 1990 the Complainant was the subject of differential application of the rules of the department regarding advance notice for time off;

m) In the latter part of 1989 and continuing to present the complainant has been the subject of systematic harassment by the opening of letters marked "confidential" which come to her at the work place.

n) On or about March 2, 1990 the Complainant was the subject of harassing and derogatory remarks made by Mr. Bill Cowan to a fellow employee in her department.

o) On or about April 5, 1990 a fellow employee in the Complainant's department was threatened with employment sanctions if they continued to interact with the Complainant at work. These threats were instigated by Mr. Cowan and made by Mr. Botterill;

p) On or about August 27, 1990 the grievor did receive a threatening letter from an unknown employee at the Ministry of Natural Resources. Since this time the Ministry of Natural Resources has refused to take adequate steps to discover the source of this threatening letter and thereby adequately protect the interests of the Complainant in the work place.

q) On or about September 18, 1990 the Complainant was treated in a differential, humiliating and harassing manner by Mr. John Kerr, Director of the Financial Resources Branch and Mr. John Queen, Co-ordinator of the Reorganization and Relocation of the Ministry of Natural Resources, at a meeting to discuss the reorganization and relocation of the Ministry. The differential treatment was the direct result of the other attendants at the meeting being aware of the Complainant's position as Union Steward and President of Local 507.

r) On or about September 18, 1990 the Complainant did attend a meeting with Mr. J. Kerr and Mr. Ed Brannen. This meeting had been called to discuss the threatening letter which the Complainant had received and the general anti union animus in this office of the Ministry of Natural Resources. At this meeting Mr. John Kerr did accuse the Complainant of wasting the Ministry's time by filing unnecessary and unproductive grievances;

s) On or about September 20, 1990 Mr. John Botterill attempted to prevent the grievor from attending a Grievance Settlement Board hearing in her capacity as Union Steward by repeated harassment and questioning regarding her right to attend the hearing.

t) On or about September 21, 1990 vicious harassing and threatening remarks were made to the complainant in her department. Since this time management has refused to treat seriously the incident and take appropriate disciplinary measures;

u) On or about October 11, 1990 the grievor was the subject of differential treatment regarding her attendance at a funeral for a fellow department member, Mr. Fred Bailes;

v) During the period of December 1990 until January 1991 Mr. Botterill and Mr. Cowan did condone and encourage slanderous

remarks made by some employees regarding the Complainant's medical condition;

w) On or about November 28, 1990 Mr. Botterill and Mr. Cowan did encourage and condone slanderous comments made by Mr. Claudio Rita about the Complainant;

x) Since the filing of the Complainant's Memorandum on July 21, 1989 the Complainant has repeatedly been refused reasonable requests for assistance to cope with her unreasonable and unhealthy work load;

y) Since January 18, 1988 the Complainant has been constantly watched, monitored and harassed by Mr. Cowan and/or Mr. John Botterill when other employees approach her to speak with her at her work desk. Other employees are not subject to similar monitoring and harassment when they interact with their co-workers at their desk areas.

We were provided with a book of documents by Counsel for the employer, relating to each of the above particular allegations. These were profferred to support the Employer's argument that theses matters had been dealt with or withdrawn in earlier proceedings. We were provided with particular information on each of the allegations. Using capital letters corresponding to the alphabetical reference in the complaint, we were told as follows:

B) The grievor's failure in a job competition, referred to in paragraph b) was the subject of a grievance, that grievance was settled with an agreed Board Order, dated November 16, 1988, on the basis of a rerun of the competition. The grievor was unsuccessful on the rerun and grieved again. That grievance was heard and on October 16, 1989 dismissed by Arbitrator Slone, with both nominees concurring .

C) The relocation of the Complainant's desk was the subject of grievance filed June 30, 1988 and July 28, 1988. These grievances resulted in the Complainant being given two options with respect to the location of her desk, she chose one and on August 17, 1988 the two grievances were settled/withdrawn by letter signed by the Complainant.

D) In regards this matter Counsel for the Employer referred us to an Award of Arbitrator Samuels, dated March 11, 1991, GSB case #1870/90. In that Award arbitrator Samuels notes that the grievance he is hearing, filed on September 19, 1990, is identical to one filed on February 26, 1990 which was not proceeded with after the second stage reply from the Employer. The Samuels Award notes as follows:

> At the commencement of our hearing, counsel for the grievor withdrew the allegation of a violation of the Act. With respect to the alleged violation of the Collective Agreement, he explained that the grievance arose out of a continuing pattern of harassment over three years ...

Samuels sets out a list of particulars supplied by counsel for the grievor, for our purposes it is only relevant to note that paragraph 7. of the particulars set out in the Samuel's award is as follows:

> 7. September 21, 1988; Memo from Mr. Cowan regarding a doctor's certificate be required of the grievor for a two day absence.

This is the same request as is cited in paragraph d) in the complaint before us. Samuels sets out the conclusion of the Grievance hearing as follows:

> After hearing Union Counsel's reply to the preliminary objections, the Board met with counsel to discuss the case. Following this discussion. Ms. Desi withdrew her grievance. Thus, she no longer alleges any violation of the Collective Agreement based on the twenty-nine alleged events set out in her counsel's letter of particulars.

Counsel for the Employer argues that it is clear from the earlier reference in the Samuels Award cited above that not only was the allegation of violation of the Collective Agreement being withdrawn but that the alleged violation of CECBA was withdrawn as well. In any event he submits these matters can not be resurrected.

E) The matter raised in paragraph e) of the complaint was raised in paragraph 9) in the Samuels Award { see D) above for explanation}.

F) This refers to an incident over an error in a reference to a regulation on a notice posted on the Xerox machine with respect to improper use of the equipment. It resulted in an exchange between the Complainant and her Supervisor. No grievance was filed at the time and Counsel for the Employer contends that it is an abuse of process to raise it at this late date.

G) These incidents resulted, at the time, in an investigation by Wayne Yetman into alleged harassment. The investigation was completed on October 13, 1989 and no further action was taken until the reference to those events in paragraph 16, in the grievance heard by Samuels.

H) This matter was the subject of the grievance before Samuels, as set out in paragraph 17 of the enumeration of issues in his Award.

I) At issue, apparently, is Joel Rives, technical advisor to John Weeks, at a stage two grievance meeting, saying to the Complainant after being interrupted by her, "shut up Jeanette - let me finish and it will be explained". The Complainant wrote to Weeks about the matter on October 25, 1989 and Weeks replied on October 31, 1989, with assurances that Mr. Rives would be more careful in his language in the future and that management would take steps to ensure that their next meeting was "constructive and not confrontational".

No further action was taken at the time. This matter was not raised in the grievance before Samuels and was not made the subject of a grievance at the time. Counsel argues that it was not raised in a timely fashion and should not be resurrected at this late date.

J) On January 14, 1990 the Complainant sent a memo to John Botterill regarding an incident on January 12, 1990. This was followed by a letter from Botterill to the Complainant dated January 22, 1990, wherein he offered to discuss the matter further at her convenience.

It is not clear if this incident was covered by the particulars before Samuels or not. In any event no further steps were taken at the time of the incident.

K) The Union does not dispute that this issue was raised in earlier grievances which were not processed beyond stage II. Counsel for

the Employer argues that the charges have been either abandoned or withdrawn before the Samuels Arbitration Board.

L) This issue is specifically referred to as issue 20 in the list of the issues withdrawn before the Samuels Arbitration Board.

M) This issue is specifically referred to as issue 23 in the list of the issues withdrawn before the Samuels Arbitration Board.

N) This issue is specifically referred to as issue 24 in the list of the issues withdrawn before the Samuels Arbitration Board.

Mr. Cowan's explanation of the incident is alleged to be as follows:

> The remark referred to may be my usual one where employees who I have assisted to improve their position and pay have returned to the office to visit. — "Slumming today eh!" — All staff, that I know have left us receive this greeting from clerical to Assistant Deputy Ministers none are offended and usually reply "Certainly am". (This remark is not alleged to have been directed to the Complainant but to another employee who was talking to the Complainant)

O) This issue is specifically referred to as issue 26 in the list of the issues withdrawn before the Samuels Arbitration Board.

P) This issue is specifically referred to as issue 29 in the list of the issues withdrawn before the Samuels Arbitration Board.

Q) This matter does not appear to have been raised in the grievance before Samuels. In any event, no action was taken at the time by the Complainant.

R) This issue is related to that raised in paragraph p), no grievance was filed regarding this incident at the time.

S) This matter does not appear to have been raised in the grievance before Samuels. It was not made the subject of a grievance when it arose in September 1990.

T) Complaints about comments made to the Complainant by another employee were directed to John Botterill. He investigated the matter and sent a letter to the Complainant October 1, 1990. No further action was taken by the Complainant at the time.

U) This matter was not raised in the grievance before Samuels and no grievance was filed regarding it at the time.

V) This matter was not raised earlier and Employer counsel requested that particulars of the events be provided.

W) This matter involves a dispute between two unit employees. On January 31, 1991 Botterill sent a letter to the Complainant confirming "an agreement" which had been reached between the parties involved. No further action was taken by the Complainant on this matter until this Complaint.

X) Counsel for the Employer alleges that this matter is covered by various allegations in the grievance before Samuels and are included in a grievance dated January 31, 1991, which the Union claims is still pending, but which the Employer says has been dropped or abandoned.

Y) These matters are included in the grievance before Samuels and found in paragraphs 27—28 of the list of incidents covered by his Award.

Counsel for the Employer maintains that the Complaint raises a series of allegations which have been the subject of grievances abandoned, withdrawn or dismissed; the subject of grievances pending; matters which could have been raise as grievances at the time of the alleged incidents but were not; or are matter so trivial and insignificant that it would be a waste of time to hear them.

As to the argument that these matters had been withdrawn we were referred specifically to the written record of the grievance heard by Arbitrator Samuels, dated March 11, 1991, File # 1870/90 where he said at page 1 as follows:

> This was the second grievance alleging precisely the same violations and requesting the same remedial action. Her first grievance was filed on February 26, 1990, and, after the second stage reply, no further action was taken by the grievor or the Union on her behalf.
>
> At the commencement of our hearing, counsel for the grievor withdrew the allegation of a violation of the Act. With respect to the alleged violations of the Collective Agreement, he explained that the grievance arose out of a continuing pattern of harassment over three years which had led to work-related stress for the grievor ... and which pattern of conduct was motivated by discrimination on the basis

> of her sex, and her creed (being her belief in trade unionism), which was a violation of the new article A ...

The Arbitrator notes at page 6 of the Decision that after hearing the Employer's preliminary objections and the Union's reply to them the Counsel for both parties met with the Arbitration Panel and the grievance was withdrawn.

Counsel for the Employer also alleged that no issue was made out in the Complaint which we could hear. He referred us to a decision by Alternate Chairman, Mitchinik, of this Tribunal, dated July 12, 1988 — *OPSEU and The Crown in the Right of Ontario* , File # T/0041/87. At page 9 of his Award the Chairman dismissed a part of the complaint of unfair labour practice saying that:

> No nexus is made out between that action of the Employer and the exercise of any rights under the Act, nor with the general flow of events set out in the other three paragraphs.

Counsel for the Employer argued that in the case before us there is no "nexus" between any of the employer actions and the exercise of any rights under the Act.

In support of the argument that these matters ought to be dealt with in the arbitration process we were referred to *United Food & Commercial Workers and Valdi Inc.* a decision of the OLRB on the policy of deferring unfair labour practice matters to arbitration. (where the OLRB did not defer to the arbitration process); and to *Raclette et al and Maritime Employer's Association* (1987), 17 CLRBR (NS) 355, a decision of the Canada Labour Relations Board setting out criteria applied for that Board to exercise jurisdiction over a similar matter. In the latter case the Canada Board set out five factors to be considered, as follows:

> 1) the existence of a collective agreement between the parties to the complaint filed with the Board;

2) the presence in the collective agreement of anti-union discrimination provisions that give the parties recourse, in such cases, to the grievance and arbitration procedure;

3) the universal applicability of the grievance procedure and in particular the possibility for the Complainant's to file a grievance in a given case;

4) the possibility of a grievance filed in a given case being referred to arbitration; and

5) the arbitrator's jurisdiction to grant redress.

All of these factors, except paragraph (2), are present in this case. A fact which is made all the more obvious knowing that all the matters complained of have already been the subject of grievances going to the arbitration stage. Counsel for the Employer maintains that this Tribunal should defer these matters to the grievance arbitration process, where they have already been settled.

Counsel for the Complainant argued that the test of whether a complaint is frivolous and vexatious is whether or not it was true — whether there is a violation of the Act. Not, he argued, whether the issues are minor or inconsequential. Counsel accepted that they have the onus to prove the allegation made, but submitted that, at this stage the Tribunal has to presume that the complainant can prove her case. Counsel pointed out that what is being alleged is a pattern of behaviour, and although some of the matters complained of may seem minor, it is the cumulative effect of the incidents which lies behind the allegation of the complainant. In summary Counsel argued that it is only *after* hearing the evidence that the Tribunal could decide if the complaint was "frivolous and vexatious".

Counsel for the Complainant referred us to the issues raised in the grievances filed by the Complainant. He submits that they are not seeking to re-litigate these

issues but points to them as evidence of an on-going retaliation against the Complainant.

In addressing the issue of whether this complaint constitutes an abuse of process Counsel pointed out that ten of the instances cited in the complaint were not the subject of earlier grievances.In fact, from paragraph "q" on, all the instances alleged are subsequent to the date of the grievance before Arbitrator Samuels. Again, Counsel made the point that they are not seeking to re-litigate these matters but to rely on them as evidence of harassment. What the Complaint raises is a different cause of action than is raised in the grievances. Further, Counsel argued, they raise matters over which this Tribunal has exclusive jurisdiction. Counsel pointed out that this collective agreement does not have a provision in it, similar to that found in many private sector agreements, prohibiting discrimination on the basis of Union activity.

Counsel argued that there is no precise overlap between this Complaint and the matters raised in the grievance, that this is not the same issue as before the arbitrator, and the issue here is not one that an arbitrator has jurisdiction over.

Counsel submitted that the only substantial point raised by Counsel for the Employer was timliness. However, he submitted, the Employer can not argue prejudice to their position and come as well prepared as they have in this case to defend the Complaint. Counsel submitted that June 19, 1991 was not the first time that the Employer heard the allegations raised by the Complaint, it was raised in a grievance in 1989 and remained alive until October 1989. It was made again in a grievance filed on February 26, 1990, and remained outstanding until February 28, 1991, when the Employer was advised it was not being pursued in that grievance. However, it was not withdrawn at that time. Counsel maintains that there was no real period of delay. The Employer had notice throughout that the Complainant

thought she was being dealt with contrary to the Act. The last incident alleged is five months prior to the complaint being filed. Counsel maintained that this was a triggering event which allows reference to the earlier incidents.

Counsel for the Complainant suggested that we take from the Mitchnick decision a completely opposite conclusion than the one urged on us by the Employer. Counsel claimed that all the Complainant must do is allege the nexus between the Employers action and the exercise of rights under the Act and then go on to prove the allegations, even if the matter could have been the subject of an individual grievance. At page 9 of his decision the Chairman says:

> The Union's case, on the other hand, is that the actions complained of all were motivated by a desire to punish employees for, or discourage employees from, pursuing their collective-bargaining rights with respect to scheduling and to their classification, contrary to the sections of the Act enumerated. By allowing the complaint to proceed, we make no judgment about that one way or the other. So long as the minimum outline of a *prima-facie*, or arguable, case has been put before us, if a complainant insists on proceeding, it is the Tribunal's obligation to make its judgment only after the parties have had the opportunity to adduce their evidence.

With respect to deference to the arbitration process Mitchnick said at page 10 of the decision:

> ... we are satisfied, as indicated, that the argument of the complainant has brought these paragraphs within the potential scope of the unfair-labour-practice sections set out in the complaint, and they do in fact raise fundamentally different issues from those that can or will be addressed through the grievance and arbitration procedures. For that reason we are of the view that deferral to grievance and arbitration would not provide an adequate avenue for addressing the issues that have been raised before us, and that the Tribunal has no option but to accept jurisdiction over these matters on its own (cf., for example, the discussion of the "deferral" policy of the National and Ontario Labour

> Relations Board in *Valdi* ,[1980] OLRB Rep. August 1254, particularly at paragraphs 6 and 7).

Counsel for the Complainant referred us to a decision of Vice-Chair Devlin, *OPSEU and The Crown in the Right of Ontario (Ministry of Correctional Services),* File # T/0018/89, (May 16, 1990) a case where a grievance and a s. 29(2) Complaint were filed and resolved and subsequently resurrected as a second Complaint. At page 6 of that Award Devlin said:

> The issue is whether the Tribunal has jurisdiction to entertain the complaint of June 15, 1989. In this regard, Section 32(5) of the *Crown Employees Collective Bargaining Act* provides that where a matter complained of has been settled and the settlement has been reduced to writing and signed by the parties or their representatives, the settlement is binding and must be complied with according to its terms. Equally, where the Union expressly or impliedly withdraws a complaint unconditionally, it will not be permitted to have second thoughts at some later date and to refile the same complaint. Were it otherwise, there would be no finality to the proceedings before the Tribunal and the Tribunal could be subjected to an endless abuse of its process. See by way of analogy *Re United Automobile Workers, Local 1285, and American Motors (Canada) Ltd.* (1964), 14 L.A.C. 422.

On the facts of that case Devlin found that the Settlement arrived at was conditional upon a further meeting taking place to resolve certain matters, thus she found that:

> ... the withdrawal was not an unqualified acceptance of the position of the Employer but instead, the parties were going to attempt to resolve the matters raised in the grievance and the complaint by other means.

The facts in this case are significantly different from the case decided by Devlin. There she was able to find that the withdrawal of the matter was conditional. The withdrawal in this case is clearly not conditional. We have no evidence of the intentions of the grievor when she withdrew allegations of a

violation of the Act from the grievance before Samuels, and later withdrew the rest of the grievance. However, it seems inconceivable that, if it was the intent to withdraw the grievance in favour of a Complaint to the Tribunal, it would not have been made clear by Counsel at the time. In the absence of the expression of a clear intent to withdraw in favour of another forum, Counsel for the Employer is quite justified in assuming the matter has been laid to rest finally and irrevocably.

In the text *Evidence and Procedure in Canadian Labour Arbitration* Professor Gorsky says, at page 234:

> "If at first you don't succeed, try, try again" may be a worthy maxim, but it does not apply in law. It is a rule of common law that a case should only be tried once. This rule applies to arbitrations as well as to court cases. The rule is based on the easily defensible idea that there should be an end to litigation and that it would be unfair to impose on a party the burden of defending himself two or twenty times over.
>
> There are several ways in which repeated hearings on the same matter are prevented. The first is called "cause of action (*res judicata*) estoppel". An issue before the parties may contain several sub-issues. In a case dealing with a violation of a rule there are several sub-issues: Was the rule posted? Was it reasonable? Did it apply to the grievor? <u>If the larger issue has been decided, either by a board or by an unconditional settlement, withdrawal, or abandonment beforehand, the lesser ones cannot be made the subject of another arbitration.</u> (emphasis added)

A footnote to the above text cites the authority of *Town of Grandview v. Doering,* [1976] 2 S.C.R. 621, where the Supreme Court of Canada adopts a Statement from a much earlier British authority *Henderson v. Henderson* (1843), 3 Hare 100, where Vice-Chancellor Wigram says:

> The plea of *res judicata* applies, except in special cases, not only to the point upon which the Court was actually required by the parties to form an opinion and pronounce a judgement, <u>but to every point which</u>

> properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. (emphasis added)

Reading these passages together it is difficult to conclude that the actions of the complainant in withdrawing and settling matters before Arbitrator Samuels should not be taken as finally settling those matters, and precluding their resurection before this Tribunal.

Settlement, withdrawal and *res judicata* is dealt with in the text *Canadian Labour Arbitration* , by Brown & Beatty at ¶ 2:3230:

> The clear purpose of the rule that a settled, withdrawn, or abandoned dispute cannot be the subject of a subsequent submission to arbitration is to provide finality. As one arbitrator has stated [*City of Sudbury* (1965), 15 L.A.C. 403 (Reville)]:
>
> > The grievance procedure is designed to provide members of the bargaining unit and the union with a method of orderly processing their respective grievances. In order to avoid the expense inherent in the arbitration process the procedure provides for bona fides efforts to be made by both the grievor and management to settle the dispute at various stages and at various levels. It follows, therefore, that if the grievor and/or the union actually or impliedly accept the decision of management they should not be allowed to have second thoughts on the matter and reprocess essentially the same grievance at a later date. If this were to be allowed, management would never know whether, in fact, its decision had been accepted by the individual grievor or the union representing him, and management would be plagued and harassed in what would be a plain abuse of the grievance procedure.
>
> Although this view has been generally accepted by arbitrators, at least one arbitrator has indicated that the proper approach is to weigh the considerations of efficiency and finality against the substantive issue in question, and that *prima facie* the rights created by the collective agreement should be dominant and should give way only to a

> demonstrated abuse of process. Others have suggested that for a settlement to operate in such a manner, the parties must clearly set out in minutes or otherwise show an intention that the agreed-upon interpretation should govern in the future.

We do not believe that a finding of *res-judicata* depends on whether the pursuit of the matter settled is an abuse of process. Abuse of process is a different issue and the two should not be confused. The test for the application of *res-judicata* must be whether there it was clearly understood that the matter in issue was being settled or withdrawn. When the matter is withdrawn or settled before an arbitrator, without conditions, it ill behooves one of the parties to later claim that the intention was not that it was settled or withdrawn *finally*.

In addition to being barred by application of the rules of *res-judicata* we also believe it is an abuse of process to attempt to resurrect these matters by way of a Complaint to this Tribunal. Particulary when that was not clearly expressed as a reason for the earlier withdrawal. Clearly that is what Vice-Chair Devlin said in, *OPSEU and The Crown in the Right of Ontario (Ministry of Correctional Services),* File # T/0018/89, (May 16, 1990), the only distinction being that in that case she found the settlement and withdrawal to have been conditional.

As regards the matters raised from paragraphs q) —y) in the Complaint, these were all within the scope of the Complainant's knowledge in March 1991 when she withdrew matters from the Samuels arbitration panel. No intention was expressed at that time to proceed in an other forum with the same or any new allegations. It is this use of the process, not the subject of the complaints, which is vexatious. The Tribunal must be wary not to allow procedural objections to defeat real issues. However, where a Complainant has had every opportunity to present the substance of her complaints to adjudication, but has unconditionally withdrawn, so as to lead the Employer to believe that matters have been put to rest, it is

vexatious, and an abuse of process, to resurrect those allegations or new allegations of a similar nature which the Complainant was aware of when the matters were withdrawn.

CONCLUSION

For all the above reasons this Complaint is dismissed.

DATED THIS 22 DAY OF OCTOBER 1992

DOUGLAS C. STANLEY, Vice-Chairperson

PATRICK O'KEEFFE, MEMBER

ROBERT GALLIVAN, MEMBER

Ontario Public Service
Labour Relations Tribunal

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T/0025/91

IN THE MATTER OF AN APPLICATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Association of Correctional Managers

Applicant

- and -

The Crown in Right of Ontario
(Ministry of Correctional Services)

Respondent

BEFORE:	D. Stanley	Vice-Chairperson
	M. Sullivan	Member
	D. Guptill	Member
FOR THE APPLICANT:	A. Camman Counsel Beccarea, Camman & Steele Barristers & Solicitors	
FOR THE RESPONDENT:	D. Brown Counsel Crown Law Office-Civil Ministry of the Attorney General	
FOR THE THIRD PARTY:	I. Roland Counsel Gowling, Strathy & Henderson Barristers & Solicitors	
HEARING:	October 20, 1991	

This is an application for representation rights brought by The Ontario Association of Correctional Managers, under s. 2 of the Crown Employees Collective Bargaining Act, R.S.O. 1980, c. 208. The unit applied for is described as follows:

> ... persons employed by the Ministry of Correctional Services at the Elgin Middlesex Detention Centre, 711 Exeter Road, London, Ontario, above the rank of C.O.2 including without limiting the generality of the forgoing : Superintendent, Deputy Superintendent, Senior Assistant Superintendent, (Corrections) Assistant Superintendent, (Programmes and Services), Young Offender Unit Manager, Business Coordinator, Occupational Health & Safety Coordinator, Superintendent's Secretary, Manager Inmate Records, Psychologist, Duty Chaplain, Coordinator Health Services, Manager Recreation Programs, Coordinator Maintenance Services, Shift Supervisors, Scheduling Officer, Adult Floor Coordinators, Young Offender Floor Coordinators and Security Officer.

Counsel for the applicant asked, at the hearing, that we amend the description by removing the "Psychologist". Although the unit applied for clearly encompasses only one institution the Applicant alleges that they have as members 600 of a potential group of 1,300 Corrections personnel.

The Ontario Public Service Employees Union, (OPSEU) filed an intervention with the Tribunal. They have representation rights by virtue of s.11 of Regulation 232 under CECBA for an all employee unit of persons employed in Corrections excepting certain classifications (Correctional Officer IV and above).

Counsel for OPSEU claims that, if the person in the unit described by the applicant are employees entitled to representation, then they must fall within the existing OPSEU unit.

Counsel for the Employer objected to this Tribunal's jurisdiction to entertain the application in so far as it clearly is brought for persons who would fall within the "managerial exclusions" to the definition of "employee" set out in s. 1 (1)(l) of CECBA as follows:

> (l) person employed in a managerial or confidential capacity" means a person who,
>
> (i) is employed in a position confidential to the Lieutenant Governor, a Minister of the crown, a judge of a provincial court, a deputy head of a ministry of the Government of Ontario or the chief executive officer of any agency of the crown.
>
> (ii) is involved in the formulation of organization objectives and policy in relation to the development and administration of programmes of the Government or an agency of the Crown or in the formulation of budgets of the Government or an agency of the Crown,
>
> (iii) spends a significant portion of his time in the supervision of employees,
>
> (iv) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,
>
> (vi) is employed in a position confidential to any person described in sub-clause(i), (ii), (iii), (iv), or (v)
>
> (vii) is employed in a confidential capacity in matters relating to employee relations including a person employed in a clerical, stenographic or secretarial position in the Civil Service Commission or in a personnel office in a ministry or agency of the Government of Ontario, or

(viii)is not otherwise described in subclauses (i) to (vii) but who in the opinion of the Tribunal should not be included in a bargaining unit by reason of his duties and responsibilities to the employer;

Counsel for the applicant advised that there were two arguments he intended to make to meet these preliminary objections. The first was an argument that went to the proper interpretation of the managerial exclusion. Counsel for the applicant conceded that the employees described in the unit applied for could fall within 1 (1)(l) (iii) but argued that, on a broad interpretation of the Act, they ought not to be excluded from the class of employees entitled to collective bargaining. In presenting this argument he also concede that, if we found them to be employees for the purpose of bargaining, they may fall into the OPSEU unit. The second alternate argument, made only on failure of the first, is that if they are found to be excluded from the benefits of collective bargaining by virtue of being "managerial" the exclusions in the Act violate the Charter of Rights and Freedoms guarantees of freedom of expression, association and security of the person, also that they constitute a denial of the equal protection of the law. Counsel for the Applicant agreed that we should deal with the first argument and the employer's objection to our jurisdiction leaving the Charter argument to a later date if necessary.

Counsel for the Applicant urged that we not apply the managerial exclusions mechanically, but that we read them in the context of the "spirit and intent of the legislation", and the environment of the correction services. Counsel submitted to us that the only change that would be brought about by our granting the application would be that the people described in the unit would be able to bargain collectively for salary levels. Counsel concedes that these employees spend a great deal of their time supervising other employees. He argues however that this supervision is not in relation to collective bargaining issues and that the necessary dichotomy of managers and employees, which is a requirement for collective bargaining, is not offended by the inclusion of these persons in the employee group. Counsel argues

that it is only the executive branch of the Ministry of Corrections who need to be excluded to maintain the arms length relationship between the employees who bargain collectively and the managers who in theory have interests in opposition to that group. Counsel contends that the group of employees covered by this application are both supervised and supervisory, they are neither managers in the strict sense of that word nor employees as defined by the legislation. He contends that they have few of the advantages of either group, that their salary levels have been compressed and their rights and status eroded.

In support of his argument counsel referred us to a report done by Professor Weiler for Management Board of Cabinet in 1988, entitled "Appropriate Methods for Establishing Salaries and Employment Conditions for Professional Employees of the Government of Ontario". That report resulted in voluntary recognition of professional groups of employees by the government. These professional employees are excluded from the definition of employee in the same manner as are "persons employed in a managerial capacity". In his report Weiler makes the point that these professional persons are excluded simply by virtue of their professional status, that it has nothing to do with their being employed in a "managerial" capacity and it has nothing to do with their involvement in collective bargaining related matters on behalf of the employer. We are not sure that the Weiler Report is of much assistance to the applicant when it comes to interpreting the statute because, what it serves to underscore is that CECBA arbitrarily excludes from collective bargaining employees for whom the philosophical argument for the right to bargain collectively can be easily made. In fact Weiler makes that argument rather forcefully to the end that the excluded professionals were given bargaining and representation rights outside the statute. Counsel for the applicant urged that we read these exclusionary provisions in the context of the whole Act, when you do that you come to the conclusion that it is not at all inconsistent for the legislature to have excluded from collective bargaining, employees who would not be in a

conflict position were they included in a bargaining unit and who, on the application of policy grounds used by the Ontario Labour Relations Board in administering the *Labour Relations Act* , might otherwise be included.

Just as in the case of the professional employee, there are groups of persons specified in the definition of "persons employed in a managerial and confidential capacity" who are not involved in the type of management functions that have served to exclude persons under the private sector legislation. This expansive and arbitrary nature of the exclusions under *CECBA* was commented on by Chairman Shime in, *OPSEU and THE CROWN IN THE RIGHT OF ONTARIO*, T 3/76, April 6 1977, where he said:

> However, when one examines the provisions of the *Crown Employees Collective Bargaining Act* it is apparent that there are significant differences between that Act and the *Ontario Labour Relations Act.* The *Ontario Labour Relations Act* excludes persons from being an employee "who in the opinion of the Board exercised managerial functions". That statute, it is abundantly clear, gives the Ontario Labour Relations Board a complete discretion to determine who is managerial , whereas the *Crown Employees Collective Bargaining Act* explicitly defines those persons who are employed in a managerial capacity. Under section 1(1)(m) of the *Crown Employees Collective Bargaining Act* there is a reasonably complete Code designed to define those persons who are managerial or confidential.

And later in the same decision, commenting on sub-clause (iii) specifically, Chairman Shime said:

> If one looks at the scheme of section 1(1)(m) of *CECBA* and particularly subsection (i) to (iv) inclusive it provides some indication as to the nature of the people that the legislature intended to exclude as being managerial or confidential. At the top of the pyramid are persons such as Ministers of the Crown, judges, deputy heads of ministries and chief executive officers of agencies. At the bottom and covered by subsection (iv) are persons required to deal formally on

> behalf of the employer with employee grievances. These latter appear to be the first line or front line supervisors who are excluded from the bargaining unit because of the potential conflict of interest which they might have in their duty to the employer if they were to be included in the bargaining unit . At this front line level the employer does not have sole control of these persons because the handling of grievances may depend on the provisions of the grievance procedure which is a bargaining matter. Next up the ladder, so to speak, is an employee who is a supervisor in the conventional sense. That is, he must spend a significant portion of his time in the supervision of other employees. This subsection, to a great extent, minimizes the problem of dealing with a person who is labeled as a "supervisor" or whose duties are referred to as "supervisory" where, in fact, he has only incidental supervisory functions with little original authority or whose supervisory authority may not relate to employee relations at all. See e.g. Nurses Association Ajax and Pickering General Hospital 1970 OLRB Rep. 1283 (February) at p. 1289.

Accepting this concept of hierarchical ranking we must point out this Tribunal's specific exclusion of the Corrections Officer IV in, OPSEU and THE CROWN IN THE RIGHT OF ONTARIO, [Bethel, Correction Officer IV] FILE 9/76, April 6, 1977, where Chairman Shime said:

> The section starts with the premise that before a person is to be excluded from collective bargaining he must be employed in a managerial capacity. That term or similar terminology is used in other labour relations legislation and the thrust of the term connotes a person who has an independent decision making function. ... That theory is based on the concept that a manager, or any person who is on the managerial team, performs work which requires the exercise of some responsibility and one entrusted with such responsibility should be capable of making decisions. If one does not have that capacity it is apparent that, regardless of title, that person does not have any managerial responsibility and cannot be realistically and practically considered as a member of management. The distinction which generally sets apart non-bargaining unit personnel from bargaining unit personnel is that the former exercises an independent discretion whereas the latter merely implement decisions made by others and has little latitude to use any independent discretion except in predetermined circumscribed areas.

Thus, in considering section 1(1)(m)(iii) of the Act, we are of the view that similar considerations should generally apply notwithstanding differences in legislative language in the various labour relations statutes. The CECBA is not as wide open as most other legislation. It further refines the definition of persons employed in a managerial capacity. In the instant case the definition is concerned with a person employed in a managerial capacity who spends a significant portion of his time in the supervision of employees. There are a number of observations which can be made about the subsection. First, it confines the managerial employees to someone who deals with employees. In our view the intent of the subsection is to exclude from the bargaining unit those persons who are responsible for seeing that the work gets done and that the collective agreement is adhered to. A person who supervises other employees should not be placed in a position where his identification with management's interests may be diluted by his participation in the bargaining unit.

We are also of the view that the term "supervision" carries with it the managerial concepts of responsibility, effective control and independent decision making in so far as other employees are concerned. For the purpose of this subsection, a person who is labeled as a "supervisor" will not necessarily be considered a member of management merely because of that title or label. There is an obligation on the Tribunal to fully examine the duties and responsibilities of a person who is the subject matter of an application pursuant to Section 38 regardless of title.

Furthermore, in our view, supervision of employees does not simply mean relaying predetermined and detailed policies, practices, procedures or instructions emanating from a more senior level of management to employees in the bargaining unit. Mere implementation of decisions made by others or the mere following of or possession of orders or policies made and directed by others does not constitute supervision. A supervisor must have some latitude to exercise independent discretion vis-a-vis other employees. More particularly, that independent discretion must relate to the supervisor's authority or control over those employees. Thus a person who merely advises or coordinates or serves as a conduit without any effective control or authority does not really supervise. ...

... Generally speaking, management needs people to direct the work force. Not every aspect of the work environment can be reduced to a

> predetermined policy or be governed by regulation or by a collective agreement. Nor can all the problems, difficulties, needs and requirements be anticipated in advance. In the result, there usually remains a circumscribed area where individual initiative and independent decision making may be required. It is in that shadowy area that the quality and quantity of the independent decision making or its absence must be assessed. Often it is very difficult to determine on which side of the managerial line an individual falls.

The applicability of this reasoning to other Correction Officers is in our view presumed unless shown otherwise given the Tribunal's comment in *OPSEU and THE CROWN IN THE RIGHT OF ONTARIO*, FILE 9/76, April 6, 1977, where the Chairman said:

> In approaching our task under this section it is our view that in so far as practicable, we should attempt to treat each person who has a similar position title in a Ministry as having substantially uniform duties and responsibilities unless significant differences are reflected in the evidence. This should result in the total or near total inclusion or exclusion of persons in identical job positions.

This Tribunal has already decided that a Correction Officer IV is excluded under 1(1)(l)(iii), our jurisprudence suggests that all supervisory ranks above that level ought also to be excluded. The only distinction which has ever been made to the strict exclusion of "supervisors" is in the case of persons whose supervisory function is restricted to "technical matters". (see OPSEU and THE CROWN IN THE RIGHT OF ONTARIO, MINISTRY OF REVENUE, FILE T/0013/86, August 29, 1988, Devlin).

It is our conclusion, in reviewing the Tribunal's prior decisions, that the we have no discretion, in the case of a supervisor, to determine whether their exclusion is warranted on policy grounds. The legislation is very specific and its specificity has been consistently given effect to by this Tribunal. The Tribunal recognizes the

concerns of this group, however, the arguments made to us with respect to how we ought to interpret the legislation are arguments that must be directed to the persons responsible for the drafting of the legislation. It is impossible for the Applicant to concede that the persons covered by the Application are supervisors, and have the Application succeed on any grounds other than a challenge to the constitutional validity of the Legislation. We will await direction from the Applicant as to whether they wish to proceed with that challenge.

DATED THIS 23rd DAY OF JANUARY 1992

DOUGLAS C. STANLEY, VICE CHAIR

MICHAEL SULLIVAN, MEMBER

DAVID GUPTILL, MEMBER

Ontario Public Service
Labour
Relations
Tribunal

Fonction publique de l'Ontario
Tribunal administratif
des relations
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T/0033/91

IN THE MATTER OF AN APPLICATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union — **Applicant**

- and -

Chatham & District Ambulance Service Ltd. — **Respondent**

BEFORE:	G. McKechnie	Vice-Chairperson
	M. Sullivan	Member
	R. Redford	Member
FOR THE APPLICANT:	J. Reid Organizing Representative Ontario Public Service Employees Union	
FOR THE RESPONDENT:	L. Langlois President Chatham & District Ambulance Service Ltd.	

DECISION

This is an application for representation rights in which, by interim decision dated November 18, 1991 the Tribunal directed that a pre-hearing representation vote be taken. Subsequent to the taking of the vote, the parties executed a document containing the following agreements:

1. The Parties agree to waive their rights to a formal hearing in this matter and expressly waive their right to present evidence and make submissions to the Tribunal;

2. The parties agree that a bargaining unit described as follows is appropriate in th circumstances of this case:

   All employees of Chatham and District Ambulance Service, save and except those persons who are not employees within the meaning of Clause (F) of S.S.1, S.1 of the Crown Employees Collective Bargaining Act, R.S.O. 1980, c. 108, as amended.

3. The parties consent to an immediate counting of the ballots cast in the representation vote directed by the Tribunal;

4. The parties agree that the Tribunal dispose of the application on the evidence before it in accordance with section 4 (2) of the Crown Employees Collective Bargaining Act without further representations from any party.

Having regard to the agreement of the parties and to the Report of the Returning Officer, the Tribunal is satisified that more than 50 percent of the ballots cast were cast in favour of the applicant. In accordance with section 4 (2) of the Act representation rights are granted to the applicant as the bargaining agent of employees in the bargaining unit set out above.

The Registrar is directed to destroy the ballots cast in the representation vote no earlier than 30 days from the date of this decision unless representations to the contrary are received from any party.

Dated at Toronto, February 25, 1992.

Graeme H. McKechnie, Vice-Chair

M. Sullivan - Member

R. Redford - Member

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T/0036/91

IN THE MATTER OF AN APPLICATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Linda Flowers

Applicant

- and -

Ontario Public Service Employees Union

Respondent
Employee Organization

- and -

The Crown in Right of Ontario
(Management Board of Cabinet)

Respondent
Employer or Agency
of the Employer

BEFORE:	G. McKechnie	Vice-Chairperson
	B. Gallivan	Member
	E. Whitthames	Member
FOR THE APPLICANT:	S. Li Counsel Juriansz & Li Barristers & Solicitors	
FOR THE RESPONDENT: Employee Organization	J. Paul Grievance Officer Ontario Public Service Employees Union	
HEARING:	October 29, 1991	

Ms. Linda Flowers has filed an application pursuant to section 16 (2) of the Crown Employees Collective Bargaining Act, R.S.O. 1980, c. 108. Ms. Flowers seeks exemption from the payment of dues to the Respondent Employee Organization, Ontario Public Service Employees Union, because of her religious convictions.

Ms. Flowers began her employment with the Ministry of Community and Social Services, Project D.A.R.E., in South River, Ontario in March, 1991. She testified that she was not asked to join the Union, nor did she sign any documentation with respect to joining the Union at the time she started her employment. She stated that when she filled out the employment form for the one year position, she did not see any mention of a Union on the form and believed she was not involved in any Union activities. She stated that she found out that she was included in the Union when dues began to be deducted from her pay cheque. Ms. Flowers testified that she spoke with Ms. Kathy Glabb in the Human Resources area and applied for an exemption form the payment of dues. She also wrote a letter, dated June 2, 1991, to Ms. Glabb indicating that she wished to have the amount of the Union dues payable to a charitable organization. A letter dated July 18, 1991, addressed to Mr. R. Storey, of the Union, was submitted into evidence. That letter, which was written by Ms. Glabb, indicates that she had received the letter from Ms. Flowers and asked for advice from Mr. Storey with respect to the payment of Union dues to a charitable organization.

Ms. Flowers is a member of the Seventh Day Adventist Church and is actively involved in a variety of church activities. She stated that she has been a member of the local church in South River for approximately fifteen years and that she was one of the Deaconesses in the church, played both the organ and the piano at the church and taught young people. She testified that the family practised their religion on a daily basis. Ms. Flowers testified that her reason for requesting an exemption from the dues was based on the religious teachings of her church and while recognizing that the

Union's objectives were good, objected to the confrontational manner in which Unions conducted their affairs. She indicated that it was her religious belief, and the religious teaching of the church, that acting in a confrontational or adversarial manner was not appropriate.

Ms. Flowers testified that in the past she had worked for a hospital in Maryland where she was not a Union member and she had also worked at Branson Hospital in Toronto and she was not a Union member there either. She indicated that both hospitals were operated by the Seventh Day Adventists. Ms. Flowers testified that should her application be denied, she would have to sever here employment. She stated that prior to project D.A.R.E., she had not worked for the government before. She indicated that she had learned of her right to request an exemption from other members of the church.

Mr. R.G. Christiansen testified that he was a clergyman in the Seventh Day Adventist Church for approximately 42 years. Mr. Christiansen testified that the adversarial approach that Unions take is against the teachings of the church and that, although there was not an objection to many of the Union's goals, the adversarial stance was the issue.

Counsel for Ms. Flowers argued that her personal religious convictions were sincere and that the payment of dues in support of the trade Union ran counter to her religious beliefs.

The Union argued that section 16 (2) of the Act allows the Tribunal to decide if relief from the payment of dues is to be granted. The Union argued that there were three components in making this determination to grant relief: (1) are the beliefs sincerely held; (2) are the beliefs religious beliefs and (3) are the beliefs the cause of the objection to the payment of dues? The Union referred the tribunal to re: L. Van Harten and the Civil Service Association

of Ontario and the Crown and Right of Ontario a decision of the Tribunal, Owen Shime, Q.C. Chair, October 21, 1985. It was the Union's argument that Ms. Flowers delayed requesting an exemption and that she knew from the outset that her employment was part of the bargaining unit and represented by a Union.

DECISION

The Tribunal has considered the evidence and arguments in this case and concludes that Ms. Flowers should be exempted from payment of dues. In the matter of the timing of her request, there was no evidence to contradict her testimony that she joined project D.A.R.E. sometime in February or March, 1991 and that when she saw Union dues being deducted from her pay cheque she spoke to Ms. Glabb in Human Resources who indicated that she would pursue the matter. Ms. Flowers testified that she followed up these conversations with her note in June, 1991. The Tribunal does not find that the timing negates Ms. Flowers' beliefs or the relationship between the religious beliefs and the objection to the payment of dues.

The Tribunal is satisfied that Ms. Flowers is sincere in her beliefs and that the beliefs are religious rather than social or political (see re: Van Harten at page 7). In addition, the Tribunal finds the necessary relationship between the sincerely held religious beliefs and the objection to the payment of dues.

Accordingly, the Tribunal orders that the provisions of the collective agreement pertaining to the payment of dues or contributions to the Ontario Public Service Employees' Union do not apply to Ms. Linda Flowers. She shall not be required to pay dues or contributions to the Union.

Ms. Flowers requested that the amount of dues or contributions should be sent to the Heart and Stroke Foundation and if this

organization is mutually agreed upon by both the applicant, Ms. Flowers and the Respondent Union, the Tribunal so orders. If there is not mutual agreement on the Heart and Stroke Foundation, the Applicant and Respondent are directed to discuss the appropriate charitable organization and if no mutually agreeable organization can be chosen, they are to advise the Tribunal, in writing, and include representations with respect to the charitable organization to be designated by the Tribunal. The Tribunal will in that case retain jurisdiction with respect to that matter.

Dated at Toronto, this 28th day of January, 1992.

Graeme H. McKechnie, Vice Chairman

B. Gallivan, Member

"I Dissent" (dissent attached)
E. Witthames, Member

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT
R.S.O. 1980, c. 180

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

B E T W E E N :

LINDA FLOWERS (Applicant)

- AND -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(Respondent Employee Organization)

- AND -

THE CROWN IN RIGHT OF ONTARIO
(Management Board of Cabinet)

DISSENTING: E. C. Witthames

Ms. Flowers filed an application seeking an exemption to the payment of union dues to the Ontario Public Service Employees Union. Ms. Flowers claim for exemption was based on her religious convictions.

In her evidence she stated her prospective one year's employment began in March of 1991. Subsequent to the hiring and at the time of active employment she claimed under Section 16(2) of the CECBA for an exemption to the payment of union dues.

Her evidence presented the Tribunal with a very peculiar approach. She testified: "I think the Union objectives are good but their confrontational manner is not. The members have to do what they [the union] want to do, I WANT TO MAKE MY CHOICE." (emphasis added)

The only other evidence was from Mr. R.G. Christiansen, a clergyman in the Seventh Day Adventist Church and the father of the applicant. This witness spoke to the teachings of the church.

Again the Tribunal heard, "We are not in objection to the purpose of the union to receive fair wages." This witness also spoke to the adversarial position the union takes. Mr. Christiansen also admitted under cross examination he had not advised his daughter (Ms. Flowers) that working in a union environment was wrong. "I never did, she knew the teachings".

This Tribunal member accepts that Ms. Flowers, based on her evidence, is a full time active church member. But the question before the Tribunal is not her membership in a religious organization but rather are the religious convictions and or beliefs causing a barrier between Ms. Flowers' religion and the union representing The Ministry of Community and Social Services.

Owen Shime in file 9/75 - THE CIVIL SERVICE ASSOCIATION OF ONTARIO INC. and THE CROWN IN THE RIGHT OF ONTARIO - stated at page 7:

> "This Tribunal is also of the opinion that once it is determined that an applicant is religious that the applicant must also establish that the objection to paying dues or contributions to an employee organization stems from the applicant's religious convictions or belief. There must be some nexus between the religious convictions or belief and the objection. We do not have jurisdiction to grant an exemption to those

whose social principles form the basis of the objection." (emphasis added)

The applicant and the witness, a Clergyman of the church, drew the same conclusion in the evidence. Basically, they found no objection to the objectives of the union. The objection of them both was the **confrontational** approach and actions of the union.

This member finds the confrontational position rather difficult when one reflects on readings in the Bible where the Son of God confronted the money changers in the Temple and took a decidedly adversarial position.

In cross-examination, Ms. Flowers while stating that everyone was entitled to vote for their choice of political party referred to her dislike of the union support of the New Democratic Party.

In summary, Ms. Flowers' objections are based on social principles specifically her dislike of the New Democratic Party, and while stating the union objectives were good, although confrontational, she wants to make her choice.

There is a standard before the Tribunal that provides relief from the payment of dues because of religious beliefs.

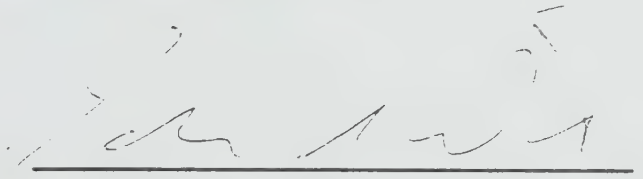
1. Are the beliefs sincerely held?
2. Are they religious beliefs?

This tribunal member acknowledges that Ms. Flowers is a firm believer in God and is an active Church member. She also believes, as her father does, that the

union also does good, except in those circumstances when the union's approach is confrontational.

It is impossible in this member's opinion for one to appear before the Tribunal stating the union is good some of the time as that would not satisfy an exemption based on a religious belief within the meaning of Section 16 of the CECBA; it is, in fact, an attempt to create two distinct standards. The applicant cannot take the position that it's nice sometimes but naughty other times when putting forth a religious objection.

This member would not, and could not, relieve the applicant from paying dues based on the evidence that was heard and noted on October 29, 1991.



Edward C. Witthames
Tribunal Member

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T/0038/91

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario
(Ministry of Health)

Respondent

BEFORE:	G. McKechnie	Chairperson
	P. O'Keeffe	Member
	R. Redford	Member

FOR THE APPLICANT:
A. Lane
Staff Representative
Ontario Public Service Employees Union

FOR THE RESPONDENT:
P. Lee
Administrator
Ministry of Health
Brockville Psychiatric Hospital

T/38/91

TRIBUNAL ORDER

Enclosed is a Memorandum of Settlement which the parties agreed would be made an Order of the Tribunal.

DATED at Toronto, this 17th day of December, 1991.

G. McKechnie, Chair

P. O'Keeffe, Member

R. Redford, Member

MEMORANDUM OF SETTLEMENT

RE: T/0038/91 ONTARIO PUBLIC SERVICE EMPLOYEES UNION
AND
THE CROWN IN RIGHT OF ONTARIO (MINISTRY OF HEALTH)

As full and final settlement of T/0038/91 the parties agree to the following:

(1) The Hospital regrets that a misunderstanding occurred with respect to the interpretation of the agreement between the parties regarding the staffing of the Assertive Community Rehabilitation Program and is pleased that the opportunity to clarify the outstanding issues has been provided through discussions which gave rise to this agreement.

The Hospital regrets any inconvenience which may have been caused to staff at the hospital as a result of this misunderstanding.

(2) The agreement between the parties with regards to filling of any Bargaining Unit assignment (developmental/-temporary) within community outreach programs of the Hospital are as follows:

(a) Notice of opportunity would be posted to current classified staff of Brockville Psychiatric Hospital for ten (10) working days;

(b) Classified staff will indicate to the Personnel Department their interest in the opportunity in writing by the end of this notice period;

(c) If more than one employee indicates an interest, the most senior qualified employee will be given the opportunity for the assignment;

(d) It is understood that Article 6 of the Collective Agreement prevails; namely, temporary/developmental assignment will be up to a six (6) month duration.

(3) Classified vacancies which may occur as a result of the expiration of unclassified contract assignments, and the completion of temporary assignments in the Assertive Community Rehabilitation Program, and which are responsive to the permanent staffing requirements of the Assertive Community Rehabilitation Program of Brockville Psychiatric Hospital, will be established and posted and restricted to classified staff of Brockville Psychiatric Hospital in accordance with Article 4 of the Collective Agreement.

Should no successful candidates for these positions be identified from within the classified staff of Brockville Psychiatric Hospital through the selection process, the positions will be reposted in accordance with Article 4 with an expanded area of search (open competition).

(4) In recognition of the significant Francophone population served by Brockville Psychiatric Hospital,the Employer will encourage employees to take advantage of French Language Training, details of which are attached hereto.

(5) The parties undertake to deliver a joint Union/Management training program to staff at Brockville Psychiatric Hospital on or before March 31, 1992.

(6) The parties agree that this settlement shall be made an order of the Ontario Public Service Labour Relations Tribunal.

Signed at Brockville this 14th day of November 1991.

For Employer:

For: Ontario Public Service Employees Union

Witnessed by:

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T|0045|91-1

T/0045/91

IN THE MATTER OF AN APPLICATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario as represented
the Ministry of Health
and Lindsay and District Ambulance Service Ltd.

Respondent

BEFORE:	D. Stanley	Vice-Chairperson
	M. Sullivan	Member
	J. Coups	Member
FOR THE APPLICANT:	I. Roland Counsel Gowling, Strathy & Henderson Barristers & Solicitors	
FOR THE RESPONDENT:	R. DeShane Lindsay and District Ambulance Service Ltd.	
FOR THE THIRD PARTY:	T. Sargeant Counsel Shibley Righton Barristers & Solicitors	
HEARING:	April 2, 1992	

This is an application for representation rights brought by Ontario Public Service Employees Union for:

> All employees of Lindsay & District Ambulance Service, save and except those persons who are not employees within the meaning of clause (f) of ss. 1 of s. 1 of the *Crown Employees Collective Bargaining Act,* R.S.O. 1980, c. 108, as amended.

On December 20, 1991 this Tribunal (Vice Chair McKechnie) ordered a pre-hearing representation vote be taken and the matter was scheduled to come before us on February 14, 1992. On that date there was no representation from the Ministry of Health, Mr. DeShane appeared on behalf of Lindsay and District Ambulance Service Ltd. and Mr. Sargeant appeared representing The Employees Association of the Lindsay & District Ambulance Service Ltd.. Both of them oppose the application on the basis that the employees are covered by the *Labour Relations Act* and not CECBA. Following the Tribunal's practice in other ambulance service cases following McKechnie Ambulance —*OPSEU and CROWN and McKechnie Ambulance Services,* November 30, 1989 — the parties were directed to develop a Statement of Facts distinguishing this case from McKechnie and the hearing was scheduled for continuation on April 2, 1992.

When the parties appeared on April 2, we were advised that, although Mr. DeShane did not agree that Lindsay Ambulance Service Inc. was an agent of the Crown, he accepted that there was no factual distinction between this case and McKechnie Ambulance.

Mr. Sargeant, representing the Employee Association, advised that the only argument in opposition to the application he would be making was that, if we decided the employees were covered by CECBA, this panel ought to order a new representation vote, because the Tribunal had no jurisdiction on December 20, 1991 to order a vote. He contended that, until the employees are declared to be crown employees, the Tribunal has no jurisdiction over them to order a pre-hearing vote. He relied on the fact that in *OPSEU and The Crown in Right of Ontario (Ministry of Health) and Owen Sound Emergency Services Inc.*, March 19, 1990 (File # T/48/89) we did not give our declaration of Crown employee status retroactive effect so as to make a strike/lock out illegal under the terms of CECBA.

This issue was dealt with by the Tribunal in *OPSEU and The Crown in the Right of Ontario as represented by Metropolitan Toronto Housing Authority and Community Guardian Company Limited*, September 28, 1990, File # T/0060/89. In that case the applicant had requested a pre-hearing vote, the Respondent objected to a vote being ordered prior to a determination of the status of the employees covered by the Application. The Tribunal said at page 6 of the Award:

> The legislative objective of providing a pre-hearing vote in the *Crown Employees Collective Bargaining Act* is of course the same as in the *Labour Relations Act* and we adopt the view expressed by the OLRB in Emery Industries as being equally applicable to our practice. For us to stay the direction of a pre-hearing vote to hear argument challenging the status of the applicant, the employees or alleged employer, is to deny any efficacy to the pre-hearing vote provided by the legislature to

> combat the very evil which had resulted from such challenges. The whole object of the pre-hearing vote is to capture the desire of employees prior to, and uninfluenced by, delays in the process. The interests of those opposed to the application are protected by the fact of the ballots being sealed and by having the opportunity for a full hearing on their objections prior to a determination as to whether the ballots will be considered by the Tribunal.

It would be inconsistent with this earlier ruling for us to find that the panel which ordered the pre-hearing vote in this case acted without jurisdiction. Without denying that there might be factual circumstances that would move the Tribunal to exercise a discretion to order a second vote, we can not find that there was no jurisdiction to order the vote in this case and there is no reason to set it aside.

As to the issue of Crown employee, or Crown agency status, we have consistently found that unless there are facts to distinguish a particular ambulance service the Tribunal's first decision — McKechnie — has binding effect. As we said in ruling on the application for employees Owen Sound Emergency Services:

> We have given the evidence in this case careful scrutiny. We have considered the arguments made to us on the substantive issues and have considered the precedent value of the McKechnie decision. We have carefully read the McKechnie decision and find that the arguments made before us were made and considered by the Board in that case. That case is, in our opinion, on all fours with the case before us and we consider it to be binding precedent.
>
> Based on the precedent of the McKechnie decision, and its application to the facts of this case, we must conclude that Owen Sound Ambulance Service is a Crown Agent and that the employees are Crown employees subject to the *Crown Employees Collective Bargaining Act.*

We find the employees of Lindsay and District Ambulance Services Ltd. to be Crown employees and order as follows:

1. Pursuant to the authority vested in us by Section 5(4) of the *Crown Employees Collective Bargaining Act* we find a separate unit of employees appropriate for collective bargaining as follows:

> All employees of Lindsay & District Ambulance Service, save and except those persons who are not employees within the meaning of clause (f) of ss. 1 of s. 1 of the *Crown Employees Collective Bargaining Act,* R.S.O. 1980, c. 108, as amended.

2. The ballot boxes containing the ballots from the vote previously ordered by the Tribunal from the above unit shall be opened and the ballots counted.

3. In the event more than 50% of the ballots cast are in favour of the Applicant the Tribunal shall issue an order granting representation rights to the Applicant.

DATED THIS 18th DAY OF APRIL 1991

DOUGLAS C. STANLEY, VICE CHAIR

MIKE SULLIVAN, MEMBER

JACK COUPS, MEMBER

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T|0045|91-2

T/0045/91

IN THE MATTER OF AN APPLICATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario
as represented by the Ministry of Health
and Lindsay and District Ambulance Service Ltd.

Respondent

BEFORE:	D. Stanley	Vice-Chairperson
	M. Sullivan	Member
	J. Coups	Member
FOR THE APPLICANT:	I. Roland Counsel Gowling, Strathy & Henderson Barristers & Solicitors	
FOR THE RESPONDENT:	R. DeShane Lindsay and District Ambulance Service Ltd.	
FOR THE THIRD PARTY:	T. Sargeant Counsel Shibley Righton Barristers & Solicitors	
HEARING:	April 2, 1992	

On April 4, 1991 this Tribunal issued an Order wherein we found that the unit applied for, being:

> All employees of Lindsay & District Ambulance Service, save and except those persons who are not employees within the meaning of clause (f) of ss. 1 of s. 1 of the *Crown Employees Collective Bargaining Act,* R.S.O. 1980, c. 108, as amended.

was, pursuant to s. 5(4) of the *Crown Employees Collective Bargaining Act*, a separate unit of employees appropriate for collective bargaining. We directed that the ballot boxes containing the ballots from the vote previously ordered by the Tribunal from the above unit should be opened and the ballots counted.

Since more than 50% of the ballots cast in the representation vote were cast in favour of the Applicant, and no Statement of Desire has been received, the Tribunal, in accordance with section 4 (2) of the Act, grants representation rights to the Applicant with respect to a bargaining unit described above.

The Registrar is directed to destroy the ballots cast in the representation vote no earlier that thirty days from the date of this decision unless representations to the contrary are received from any party.

DATED THIS 17th DAY OF August, 1993.

DOUGLAS C. STANLEY, Vice-Chairperson

MIKE SULLIVAN, MEMBER

JACK COUPS, MEMBER

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T/0051/91

IN THE MATTER OF AN APPLICATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario
(Ministry of Health)
and Mount Forest Ambulance Service Ltd.

Respondent

BEFORE:	G. McKechnie	Vice-Chairperson
	M. Sullivan	Member
	B. Gallivan	Member
FOR THE APPLICANT:	J. Reid Ontario Public Service Employees Union	
FOR THE RESPONDENT:	J. Borrett Mount Forest Ambulance Service Ltd.	
HEARING:	January 7, 1992	

File T/0051/91

RE: Crown et al Mt. Forest Ambulance Service

DECISION

This is an application for representation rights. Pursuant to an interim decision of the Tribunal dated December 13th, 1991, a pre-hearing vote was directed. The representation vote was taken on January 3rd, 1992 and the ballots were sealed pending a hearing scheduled for January 7th, 1992.

At that hearing, representations were entertained from counsel for both parties as a result of which the Tribunal orally directed that a requested delay in the proceedings was not warranted on the evidence put forth by counsel for the respondent. The Tribunal further directed that the ballots cast in the representation vote be counted, noting the agreement of the parties that a segregated ballot cast in the vote be set aside and not counted. The ballots were counted on January 22nd, 1992. Twelve ballots were marked in favor of the applicant, one was opposed and one remained segregated. Thus, the segregated ballot cast could have no effect on the outcome of the vote.

It follows, therefore, that representation rights should be granted to the applicant in accordance with section 4 (2) of the Act with respect to a bargaining unit described as follows:

> "All employees of Mount Forest Ambulance Service Ltd., save and except those persons who are not employees within the meaning of Clause (F) of ss.1, s.1 of The Crown Employees Collective Bargaining Act, R.S.O. 1980, C. 108, as amended."

and the Tribunal so directs.

There remains the status of the person who cast a segregated ballot in the representation vote. In the event the parties are unable to resolve this issue during the course of collective bargaining, their attention is drawn to section 40 (1) of the Act.

The Registrar is directed to destroy the ballots cast in the representation vote no earlier than 30 days from the date of this decision unless representations to the contrary are received from any party.

Dated at Toronto, this 3rd day of March, 1992

.....

Graeme H. McKechnie, Vice Chair

.....

M. Sullivan, Member

.....

B. Gallivan, Member

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T/0052/91

IN THE MATTER OF AN APPLICATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union — **Applicant**

- and -

The Crown in Right of Ontario, as represented by the Ministry of Health and South River/Machar Ambulance Service — **Respondent**

BEFORE:	G. McKechnie	Vice-Chairperson
	M. Sullivan	Member
	R. Redford	Member

FOR THE APPLICANT: J. Reid
Organizing Representative
Ontario Public Service Employees Union

FOR THE RESPONDENT: R. Clouthier
South River/Machar Ambulance Service
c/o Corporation of the Township of South River/Machar

DECISION

This is an application for representation rights in which, by interim decision dated December 13, 1991 the Tribunal directed that a pre-hearing representation vote be taken. Subsequent to the taking of the vote, the parties executed a document containing the following agreements:

1. The Parties agree to waive their rights to a formal hearing in this matter and expressly waive their right to present evidence and make submissions to the Tribunal;

2. The parties agree that a bargaining unit described as follows is appropriate in the circumstances of this case:

   All employees of South River/Machar Ambulance Service, save and except those persons who are not employees within the meaning of Clause (F) of S.S.1, S.1 of the Crown Employees Collective Bargaining Act, R.S.O. 1980, c. 108, as amended.

3. The parties consent to an immediate counting of the ballots cast in the representation vote directed by the Tribunal;

4. The parties agree that the Tribunal dispose of the application on the evidence before it in accordance with section 4 (2) of the Crown Employees Collective Bargaining Act without further representations from any party.

Having regard to the agreement of the parties and to the Report of the Returning Officer, the Tribunal is satisified that more than 50 percent of the ballots cast were cast in favour of the applicant. In accordance with section 4 (2) of the Act representation rights are granted to the applicant as the bargaining agent of employees in the bargaining unit set out above.

The Registrar is directed to destroy the ballots cast in the representation vote no earlier than 30 days from the date of this decision unless representations to the contrary are received from any party.

Dated at Toronto, February 25, 1992.

Graeme H. McKechnie, Vice-Chair

M. Sullivan - Member

R. Redford - Member

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T/0059/91

IN THE MATTER OF AN COMPLAINT

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Complainant

- and -

The Crown in Right of Ontario
(Ministry of Government Services)

Respondent

BEFORE:	D. Stanley	Vice-Chairperson
	M. Sullivan	Member
	W. Madigan	Member

FOR THE APPLICANT:
I. Roland
Counsel
Gowling, Strathy & Henderson
Barristers & Solicitors

FOR THE RESPONDENT:
C. Slater
Counsel
Legal Services Branch
Management Board of Cabinet

HEARING: March 16, 1992

This matter was referred to us on November 27, 1991, by Ontario Public Service Employees Union (OPSEU) as a complaint under s. 32 of the *Crown Employees Collective Bargaining Act* (CECBA). That section reads as follows:

> 32. — (1) The Tribunal may appoint an investigator with authority to enquire into a complaint that,
>
> (a) a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment;
>
> (b) a person has been suspended expelled or penalized in any way contrary to section 36;
>
> (c) an employee organization, employer or any person or persons has acted in a way contrary to section 30 or 37.
>
> (2) The investigator shall forthwith inquire into the complaint and endeavour to effect a settlement of the matter.
>
> (3) The investigator shall report the results of his inquiry and endeavours to the Tribunal.
>
> (4) Where an investigator is unable to effect a settlement of the matter or where the Tribunal in its discretion considers it advisable to dispense with an inquiry by an investigator, the Tribunal may inquire into the complaint and,
>
> (a) if the Tribunal is satisfied that the person concerned has been refused

employment ...

(b) if the Tribunal is satisfied that the person concerned has been suspended ...

(c) if the Tribunal is satisfied that the employee organization, employer, person or employee concerned has acted contrary to section 30 or 37, ...

(5) Where the matter complained of has been settled, whether through the endeavours of the investigator or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representative, the settlement is binding upon the parties, the employee organization, employer, person or employee who agreed to the settlement and shall be complied with according to its terms, and a complaint that the employee organization, employer, person or employee who agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under clause (1)(a), (b) or (c) as the case may be.

The gist of the Complaint is set out in a paragraph from the preprinted Form 29, used to file a complaint under s. 32. With the portions filled in by the Applicant underlined it reads as follows:

1. On July, 25 1991 a complaint under section 32 was filed with the Tribunal and on August 27, 1991 the parties entered into a written settlement of that complaint (a signed copy of which is filed herewith) Schedule "A" .

The form goes on to specify the manner in which the Employer has allegedly failed to comply with the settlement. Although paragraph 1 of the form refers to s. 32, there is no dispute that what was settled was an application which OPSEU had filed under section 40 (1) of CECBA. That section reads as follows:

40.— (1) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee, the question may be referred to the Tribunal and its decision thereon is final and binding for all purposes.

(2) If, in the course of bargaining for a collective agreement or during proceedings before a board of arbitration, a question arises as to whether a matter comes within the scope of collective bargaining under this Act, either party or the board of arbitration may refer the question to the Tribunal and its decision thereon is final and binding for all purposes.

The settlement filed with the Complaint bears the file number of that s. 40 application and refers to it as follows:

> Memorandum of Settlement
> The Ministry of Government Services and the Ontario Public Service Employees Union have reached a Settlement of all matters pertaining to application T/0023/91 before the Labour Relations Tribunal. The details of the settlement are attached.
> The Ontario Public Service Employees Union withdraws the application T/0023/91

When this matter came on for hearing on March 16, 1992 Counsel for the Employer raised an objection to our jurisdiction to hear the Complaint. His argument was quite simply that s. 32(5) clearly refers to a complaint under s. 32 and not to the settlement of some other application, such as one under s. 40. He argued further that under s. 32(5) the Tribunal had a jurisdiction to revisit a matter whereas under s. 40(1) a decision or settlement is "final and binding" and there is no similar power to revisit the matter. He argued that the Legislature deemed it appropriate for the Board to have that kind of jurisdiction under s. 32 but not under s. 40.

Counsel for the Employer argued the Union's only recourse is the same as if any other settlement "falls apart", and that is to revert to their original positions and the Union re-file an application under s. 40. The Union is not, he argued, held to its agreement to withdraw the original application. The thrust of the Employer's argument is that the Tribunal has no general oversight of a settlement arrived at pursuant to a s. 40 application, and that the Employer is free to "avoid" such a settlement if they so choose. In this particular instance, Counsel alleges, what the bargaining agent is trying to do is restrict the Employer's right to change a shift schedule. That, he submits, is not a matter over which the Tribunal would have had

any jurisdiction on the original s.40 application to determine the status of employees.

Counsel for OPSEU argued that the Employer's argument — that they can settle a dispute before the Tribunal and then simply resile from that settlement with impunity — does no justice to the Act or to the Tribunal's jurisdiction to enforce the Act. Counsel argued that both parties are bound by the terms of the settlement.

As to the specifics of the argument counsel for OPSEU pointed out that s. 32(5) refers to matters complained of, and that s. 40 is simply another kind of complaint. Counsel pointed out that both s. 32 and s. 40 give the Tribunal the jurisdiction to authorize an officer who then has the power to "investigate" and to attempt to effect a settlement. Counsel argued that the whole thrust of CECBA is t foster the settlement of matters and that the Tribunal must have the power under s. 32(5) to control the process where parties have come to a settlement, and that it does not matter if that settlement was of an issue raised under s. 32, s. 37 or s. 40.

Counsel argued further, that there was an inherent power in the Tribunal to control its own practice and procedure which is recognized by s. 43(1) as follows:

> 43.—(1) The Tribunal shall determine its own practice and procedure but shall afford to the parties to any proceedings an opportunity for a hearing to present their evidence and to make their submissions, and the Tribunal may, subject to the approval of the Lieutenant Governor in Council, make rules, not inconsistent with the provisions of this Act, governing its practice and procedure and the exercise of its powers.

This very issue has been dealt with thoroughly by the OLRB operating under similar statutory authority in *Rexway Sheet Metal Ltd. and Sheet Metal Workers International Union,* [1989] OLRB Rep. November 1154. In that case the Applicant came before the Board under section 135 of the *Labour Relations Act* alleging a lockout. The parties had appeared on a similar, but not the same, application a

month earlier and a settlement was arrived at. The parties were back before the Board with the applicant asking the Board to enforce the earlier settlement. We can do no better than to reproduce those applicable paragraphs of the Board's Award as follows:

> 6. At the hearing, the applicant, ... requested that the aforesaid agreement between the parties be enforced pursuant to either subsection 89(7) of the Act or, in the alternative, pursuant to what counsel described as the Board's general plenary jurisdiction. In the alternative, the applicant sought to have the hearing continue from where it had left off prior to the written agreement being entered into on October 23, 1989.
>
> 7. The respondents ... submitted that subsection 89(7) of the Act did not apply and that the Board did not, in any event, have any jurisdiction to deal with the matter. In that regard, they asserted that the settlement agreement, and indeed the entire application had been spent. They submitted that through the settlement, the parties had resolved all matters in dispute between them in the application as filed and thereafter the settlement agreement governed
>
> ...
>
> 9. I could not, would not, and did not purport to decide the jurisdictional dispute which is the real matter in dispute between the parties. That was not directly before me. Nor did I have any jurisdiction to do so in any event. However, I concluded that I did have the jurisdiction to deal with the question what affect, if any, could now be given to the settlement agreement.
>
> 9. Subsections 89(1) and 89(7) of the Labour Relations Act provide that:
>
> > 89.- (1) The Board may authorize a labour relations officer to enquire into any complaint alleging a contravention of this Act.
> >
> > (7) Where the matter complained of has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representative, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employer's organization, person or employee who has agreed to the

> settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employer's organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).

11. The respondents ... referred to *Greens Ambulance*, [1978] OLRB Rep. July 637 in support of their submission 89(7) was not applicable to this matter. In that case, the Board found that there had been no complaint filed with the Board as required by what is now 89(7) and, second, that there had not in fact been any settlement to enforce. In my view the provisions of section 89(7) apply, in the words of 89(1) to "any complaint alleging a violation of the Act". In this case the applicant complained that the respondents engaged in conduct contrary to, or in violation of the Act. There was no dispute that there was a settlement of that "complaint" (though the affect thereof was disputed). To the extent that *Greens Ambulance , supra*, suggests that subsection 89(7) applies only to complaints filed under section 89, I respectfully disagree. Further, and in any event, I am satisfied that the Board has jurisdiction to deal with complaints that settlement of matters properly brought before it have been breached in the circumstances like those in this proceeding. If that were not the case, it would tend to make a mockery of the settlement process and permit parties to ignore settlements with impunity. This Board is constituted as an expert administrative tribunal and is charged with the responsibility of applying and administering the *Labour Relations Act.* It would indeed be curious if a party could remove from the Board a matter which is within its exclusive original jurisdiction through the simple expedient of entering into and then not honouring a settlement agreement. Even if an agrieved party to a settlement agreement could go to some other forum for relief, surely the Legislature could not have contemplated or intended that some forum other than this Board should deal with the matter specifically within the labour relations expertise and original jurisdiction of the Board.

Although the Employer's case is somewhat stronger here, given the reference in s. 89(1) of the *Labour Relations Act* to a complaint alleging a contravention to the Act, as opposed to the *CECBA* reference in s. 32(1) to specific complaints that follow, it is clear from the underlined words above that the OLRB

accepted the argument that they had a "general plenary jurisdiction" to enforce the settlement of any matter which properly came before the Board on any application.

The jurisdiction would seem to have been pushed even further in *Northfield Metal Products*, [1991] OLRB Rep. May 664, where an application under 89(7) was brought to enforce a settlement of a complaint under the *Occupational Health and Safety Act.* Again it is useful to simply set out the essence of the Board's decision at length, as follows:

> 14. Settlement is perhaps the single most important method by which labour relations disputes are resolved in the Province. And this reality is particularly true with respect to proceedings before the Ontario Labour Relations Board. As the Board wrote in *Lambton County Board of Education* [1987] OLRB Rep. Oct. 1277:
>
> > The purpose of section 89 is to secure a prompt, and binding resolution of unfair labour practice complaints. The Act expressly recognizes and endorses the settlement of such complaints without a formal Board hearing and decision. The provisions of section 89 are intended to facilitate settlements. ... Each year, trade unions, employees and employers file thousands of applications or complaints before the Board. A large majority of them are settled. Sometimes the settlement favours the trade union or an employer. Other times it favours an employee. Usually it represents a compromise under which the parties neither achieve as much nor risk as much as they would by proceeding to a hearing before the Board. The parties generally arrive at a settlement in order to avoid the cost and uncertainties of litigation. The orderly resolution of Board proceedings and the efficacy of the settlement process would be gravely prejudiced if, having signed Minutes of Settlement, the party could afterward repudiate the settlement ...
>
> 15. Settlement often involves a compromise. It is a compromise that the parties themselves have evaluated and have endorsed. Many settlements include the payment of compensation by an employer to employees or the union. Many of these would no doubt never have been finalized if the employer could not have been assured that no liability or blame could be attributed to the employer. Similarly, such

> "without prejudice" settlements would often be of little utility if they were not kept confidential. It is not difficult to see why, in a particular circumstance, an employer might be willing to settle a complaint with payment of compensation to a complainant, but only if liability is not attributed and only if the community and other employees do not learn that the company has agreed to pay compensation. The Employer's fear is that the disclosure of such a payment, apart from the amount of the payment, might alone undercut the efficacy of the denial of liability, and might also lead other employees or unions to file further complaints, in the belief that the employer will settle such complaints with cash. That is why some parties insist on confidentiality as a condition of any settlement. But in any event, the parties themselves determine the terms of a settlement, not the Board. It would be counterproductive to the overall efficacy of the settlement process for the Board to evaluate the parties' motivations or the means and terms of particular settlements.
>
> 16. The same concerns led the Board to protect the settlement that the parties have reached. Where the settlement is clear, parties should not expect to be allowed to depart from the terms they have agreed to, or to be relieved from the consequences of their settlement. If it were otherwise, the settlement process, its importance in the scheme of the Board's mandate and operation, and its importance to the ongoing labour relations environment in the province would be seriously undercut, if not destroyed.

The Board found in that case that the union breached the confidentiality term of the settlement of the Occupational Health and Safety complaint, and ordered the union to repay $7,500.00 the amount of the financial settlement. The union representative on the Board added — "Although I am very uncomfortable with the end results of this decision, I have no choice but to agree with the majority in this case, for the protection of the settlement process".

Clearly these overwhelming industrial relations considerations — of supporting the process whereby the parties settle matters — has application before this Tribunal. Indeed, in so far as we are dealing with a public sector employer and the representative of public sector employees those industrial relations

considerations are even more compelling. We find that we do have a jurisdiction to enforce the terms of settlement of any matter properly brought before the Tribunal for adjudication either under s. 32(5), or on an application to reopen whatever original application led to the settlement. We note the reluctance of the OLRB to look beyond the fact of whether or not a settlement was arrived at to the merits of that settlement.

For all the above reasons we are prepared to consider the merits of the application on January 29th, 1993, the day already set for the continuation of this matter.

DATED THIS 19 th DAY OF JANUARY 1993

DOUGLAS C. STANLEY, CHAIRMAN

MICHAEL SULLIVAN, MEMBER

WILLIAM MADIGAN, MEMBER

Ontario Public Service
Labour
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Tribunal

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T/0059/91-2

T/0059/91

IN THE MATTER OF A COMPLAINT

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

BETWEEN

Ontario Public Service Employees Union

Complainant

- and -

The Crown in Right of Ontario
(Ministry of Government Services)

Respondent

BEFORE:	D. Stanley	Vice-Chairperson
	M. Sullivan	Member
	W. Madigan	Member
FOR THE COMPLAINANT	I. Roland Counsel Gowling, Strathy & Henderson Barristers & Solicitors	
FOR THE RESPONDENT	C. Slater Counsel Legal Services Branch Management Board of Cabinet	
HEARING	March 16, 1992 January 29, 1993	

This matter came before the Tribunal as a complaint under s. 32 of the *Crown Employees Collective Bargaining Act*, filed by the Ontario Public Service Employees Union. In a preliminary ruling, dated January 12, 1993, the Tribunal determined we had jurisdiction to deal with the issues raised. When the matter came back before us for determination of the merits, on January 29, 1993, Counsel for both parties advised us that they had arrived at a settlement of the matter. Further, that they wanted the terms of that settlement incorporated into and made an Order of the Tribunal. In accordance with that agreement the terms of settlement which follow are incorporated into and form an Order of this Tribunal.

AN AGREEMENT
BETWEEN

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

and

THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF GOVERNMENT SERVICES

IN RE: PUBLIC SERVICE LABOUR RELATIONS
TRIBUNAL FILE # T/0059/91

MINUTES OF SETTLEMENT

1. The Union will withdraw the complaint

2. The Ministry hereby amends the unclassified contracts of Messrs. McIntyre, Eisnor and Jevcak to provide that they shall be employed to a maximum of 40 hours a week, with no guarantee of minimum hours per week. These contracts will replace the current unclassified contracts that expire on June 23, 1993. Should the Ministry determine that it is necessary to reappoint Messrs. Jones, McCleod, Jevcak, Eisnor and McIntyre after June 23, 1993 it will renew their contracts until September 15, 1993, subject to the Ministry's right to terminate the contracts upon two weeks written notice as provided in the collective agreement.

3. The scheduling of the 5 employees shall be carried out as follows:

(a) Messrs. Jones and McCleod will be scheduled as full time employees working on a scheduled 40 hours per week.

(b) Messrs. Eisnor and Jevcak will be scheduled on average 32 hours per week and Mr. McIntyre scheduled on average 24 hours per week.

(c) The scheduled hours of work are on the basis of 168 hours per week and scheduling shall be arranged using the present process whereby each employee has input into scheduling of hours, with final approval by the Ministry.

(d) The Ministry, subject to its operational needs, shall, in scheduling, attempt to schedule Messrs. Jones and McLeod to a minimum number of weekend shifts and schedule Messrs. McIntyre, Eisnor, and Jevcak to as many weekend shifts as are consistent with their contracts, this agreement and the Ministry's requirements.

(e) The scheduling shall not be carried out in a manner that would lead to overtime entitlement for any of the employees. Messrs. Jevcak, Eisnor and McIntyre shall have no claim to overtime hours for any hours less than 40 hours per week, and for any hours worked beyond 40 hours per week that are not expressly authorized by the Ministry.

(f) The scheduling shall allow for shift changes between employees provided that no overtime payment obligations result to the Ministry

in accordance with paragraph 3(e) and provided that there be 72 hours notice, or as much notice as possible, of the shift change to the Ministry.

4. These Minutes of Settlement shall be made an Order of the Tribunal

5. This settlement is without prejudice or precedent to any other matter between the parties.

Dated at Toronto this 29th day of January 1993

(signature) Mr. Gerald Root
For the Ministry

(signature) Ms. Barbara Marshal
For the Union

DATED THIS 9th DAY OF FEBRUARY 1993

DOUGLAS C. STANLEY, VICE-CHAIR

M. Sullivan, Member

W. Madigan, Member

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T|0064|91-1

T/0064/91

IN THE MATTER OF AN APPLICATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario
as represented by the Ministry of Health
and Bobcaygeon Ambulance Service O/B 564833 Ontario Inc.

Respondent

BEFORE:	G. McKechnie	Vice-Chairperson
	M. Sullivan	Member
	B. Gallivan	Member
FOR THE APPLICANT:	E. Ogibowski Representative Ontario Public Service Employees Union	
FOR THE RESPONDENT:	A. Carley Bobcaygeon Ambulance Service	

By Interim Decision dated February 24, 1992, the Tribunal directed a representation vote be taken and the ballot box sealed to allow the parties to have the opportunity to make submissions.

The Union requested that the name of one (1) employee be included on the voters list. The employee had been discharged but had filed an unfair labour practice charge. The ballot of that employee was segregated pending resolution of the alleged violation of the Act. During the hearing April 3, 1992, the Union withdrew its request to have the employee's name included on the voters list.

In view of the Union's request, the Tribunal orders that the ballot box be opened, the segregated ballot destroyed and the remaining ballots counted.

Dated at Toronto, Ontario this 3rd day of April, 1992.

Graeme H. McKechnie, Vice-Chair

Member, M. Sullivan

Member, B. Gallivan

Ontario Public Service
Labour Relations Tribunal

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T/0064/91-2

T/0064/91

IN THE MATTER OF AN APPLICATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario
as represented by the Ministry of Health
and Bobcaygeon Ambulance Service O/B564833 Ontario Inc.

Respondent

BEFORE:	G. McKechnie	Vice-Chairperson
	M. Sullivan	Member
	B. Gallivan	Member
FOR THE APPLICANT:	E. Ogibowski Representative Ontario Public Service Employees Union	
FOR THE RESPONDENT:	A. Carley Bobcaygeon Ambulance Service	
HEARING:	May 19, 1992	

DECISION

1. As a result of the Decision of the Tribunal on April 3, 1992, the ballots cast in the representation vote taken on March 16, 1992 were counted. The Report of the Returning Officer issued on April 3, 1992 indicates that less than a majority of the ballots cast were marked in favour of the Applicant.

2. No objections have been received. Accordingly, this application is dismissed.

3. The Registrar is directed to destroy the ballots cast no earlier than thirty (30) days from the date of this decision unless representations from any party are received to the contrary.

Dated at Toronto, Ontario this 19th day of May, 1992.

Graeme H. McKechnie, Vice Chair

Member

Member

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T/0065/91

IN THE MATTER OF AN APPLICATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario
as represented by the Ministry of Health
and Halton Hills Ambulance Service Inc. (Town of Halton Hills)

Respondent

BEFORE:	G. McKechnie	Vice-Chairperson
	M. Sullivan	Member
	B. Gallivan	Member
FOR THE APPLICANT:	E. Ogibowski Representative Ontario Public Service Employees Union	
FOR THE RESPONDENT:	D. McLeod Halton Hills Ambulance Service Inc.	

DECISION

1. This is an application for representation rights in which the Applicant requested that a pre-hearing representation vote be taken. In accordance with its usual practice, the Tribunal directed that a pre-hearing vote be taken but that the ballot box be sealed to afford the parties an opportunity to make representations with respect to the application.

2. Prior to a scheduled hearing before the Tribunal, the parties agreed that no additional submissions or evidence were required. The parties further agreed that the ballots cast in the representation vote be counted and that the Tribunal dispose of the Application on the evidence before it and in accordance with section 4(2) of **The Crown Employees Collective Bargaining Act.**

3. Having regard to the report of the Returning Officer, the Tribunal is satisfied that less than fifty percent (50%) of the ballots cast were marked in favour of the Applicant. Accordingly, this Application is dismissed.

3. The Registrar is directed to destroy the ballots cast no earlier than thirty (30) days from the date of this Decision unless representations from any party are received to the contrary.

Dated at Toronto, Ontario this 19th day of May, 1992.

Graeme H. McKechnie, Vice-Chair

Member

Member

T|0068|91-1

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T/0068/91

IN THE MATTER OF AN APPLICATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario
as represented by the Ministry of Health
and Bolton and District Voluntary Ambulance Association

Respondent

BEFORE:	G. McKechnie	Vice-Chairperson
	M. Sullivan	Member
	D. Guptill	Member

FOR THE APPLICANT: I. Roland
Counsel
Gowling, Strathy & Henderson
Barristers & Solilcitors

FOR THE RESPONDENT: E. Hosie
Counsel
Mathews, Dinsdale & Clark
Barristers & Solicitors

HEARING: May 19, 1992

The Ontario Public Service Employees Union, (OPSEU), pursuant to Section 40(1) of the Crown Employees Collective Bargaining Act, has applied to the Tribunal for a determination of whether the employees of the Bolton and District Volunteer Ambulance Association, who are ambulance attendants, are employees within the meaning of C.E.C.B.A. Section 40(1) provides as follows:

> 40(1) - If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee, the question may be referred to the Tribunal and its decision therein is final and binding for all purposes.

The parties submitted an agreed statement of facts which is appended to this decision as Appendix A. In addition to the agreed statement of facts, Linda Martin, President of the Bolton and District Volunteer Ambulance Association, gave viva voce evidence. It was her evidence that the ambulance service is different from other ambulance services, particularly McKechnie Ambulance which was the subject of an earlier decision of this tribunal - Re: Ontario Public Service Employees Union and the Crown in the Right of Ontario and McKechnie Ambulance Services Inc., November 30, 1989, file number T/58/84, a decision of Pamela Picher, Chair.

Ms. Martin testified that throughout the history of the Bolton ambulance service, the Ministry of Health has had little involvement. Volunteer ambulance attendants staff the one vehicle at nights and on weekends, although occasionally a volunteer ambulance attendant will be called into duty during the work day. When that occurs, that attendant receives seventy percent of the full-time ambulance attendant's wages. There are three full-time ambulance attendants in the employ of the service. It was Ms. Martin's evidence that the training program instituted by the service was more extensive than that required by the Ministry of Health and the Ministry did not take part in the training program.

She also testified that the three different bases of operations of the ambulance service were all arranged without Ministry of Health input. The current base of operations is owned by the Town of Caledon. The Ambulance Association, through donations, provided a $100,000.00 payment to the Town of Caledon during the construction of the present base. Ms. Martin also testified that various materials in the office, including a photocopier and computer, were not provided by the Ministry of Health nor were funds received from the Ministry for them.

The Respondent argued that the training program, the volunteer complement and the type of service goes well beyond the Ministry of Health's regulations and therefore sets Bolton and District Voluntary Ambulance Association apart from other ambulance services. Counsel for the Respondent argued that the ambulance service in fact could not have operated without the use of volunteers. The Respondent also argued that with respect to the tests often used - i.e. control, ownership of tools, chance of profit and risk of loss, Bolton and District Voluntary Ambulance service is not an agent of the Crown. With respect to control, the Respondent argued that the Ministry does not have complete control over the Bolton service because Bolton has its own budget and receives donations from community members and controls its own base where the members have keys and the Ministry of Health does not. With respect to profit and loss, the Respondent argued that there was some risk of loss and pointed to a raffle which took place and resulted in a law suit. Counsel for the Respondent raised doubts that the Ministry of Health would have become involved in the lawsuit and therefore the ambulance service could, in fact, sustain a loss. With respect to the ownership of tools, the Respondent conceded that the major equipment was owned by the Ministry of Health; however, it indicated that the base of operations was not run by the Ministry but was owned by the Town and operated by the Ambulance Association.

The Applicant (OPSEU), argued that the Bolton service could not be distinguished from McKechnie Ambulance and that a careful reading of the agreed facts would demonstrate that the facts were essentially the same between the two services. OPSEU argued that the Ministry had de jure control under the Ambulance Act and its regulations. OPSEU pointed to Section 4 of the Ambulance Act, R.S.O. 1980, c. 20 as amended, indicating that Section 4(1) outlines the duty of the Ministry and refers to the establishment and maintenance of ambulance services, training and the assurance of a balanced system of ambulance services across the province. In OPSEU's opinion, the duties of the Ministry are all encompassing.

More specifically, OPSEU argues that the Bolton service is a non-share corporation pursuant to the Corporations Act and its letters patent, which were filed as an exhibit before the Tribunal, indicate that its operations are subject to the statutes, meaning, inter alia, the Ambulance Act. Further, although the Ambulance Act does not mention volunteers, regulation 14 of the Act refers to the qualifications of volunteers and defines a volunteer. In OPSEU's opinion, there is no prohibition of the use of volunteers nor is there any indication that the use of volunteers changes the nature of the ambulance service. OPSEU argues that the Ministry of Health has the power to control and in fact, does control the Bolton Ambulance Service through the powers conferred on the Minister pursuant to the Ambulance Act and the requirement of filing a variety of documents - for example, documentation by ambulance driver attendants with respect to the movement of ambulances within the jurisdiction (OASIS Manual). OPSEU argued that with respect to the nature of the building, although the building is owned by the Town of Bolton, this is not as strong an argument as was presented in the McKechnie Ambulance case in which the value of the ambulance license was at issue.

Finally, OPSEU argues that with respect to contributions by the

Ministry of Health, the fact that the Bolton Ambulance Service has not sought contributions from the Ministry is not sufficient to find that the Ministry is so uninvolved as to place the Bolton Ambulance Service in the position of an independent contractor.

The Tribunal has carefully reviewed the agreed facts (Appendix A to this decision) and concludes after this review that there is no substantive difference between the Bolton and District Voluntary Ambulance Association and the McKechnie Ambulance Service situation. In addition, the Tribunal has reviewed the decision of vice-chair D.C. Stanley in Re: The Crown Employees Collective Bargaining Act and Ontario Public Service Employees Union and the Crown in Right of Ontario, March 19, 1990, file number T/48/89. This was a decision which involved the Owen Sound Emergency Services Inc. and the question raised was the same as that in the McKechnie Ambulance case and in the instant situation - that is were the employees Crown employees as defined by the Public Service Act? Mr. Stanley found that the relationship between the Crown and Owen Sound Ambulance and the Crown and McKechnie Ambulance were "in all material aspects identical." (p. 3). In the same manner, the Tribunal finds that in the case of Bolton and District Voluntary Ambulance Association, the agreed facts and the viva voce evidence of Ms. Martin do not distinguish it from either the Owen Sound case or the McKechnie Ambulance case. Counsel for the Respondent argued that the nature of the service, that is, a large proportion of volunteers should set it apart from the other ambulance services and also pointed to such items as training and the base of operations. In the Tribunal's view, the existence of volunteers does not detract from the fact that the three full-time employees are not treated any differently than employees of other ambulance services and it is to these employees that OPSEU has turned in the matter of the certification. Further, the Tribunal finds no difference in the degree of control, ownership of tools and risk of profit and loss that were the tests used in the McKechnie Ambulance case. Counsel for the Respondent pointed to Re: Civil

Service Association of Ontario and Fanshawe College of Applied Arts and Technology and Council of Regents (1967) O.L.R.B. Rep. (Dec) 829, indicating that the O.L.R.B. concluded that the college had very little independent discretion. Although there may be somewhat more discretion in the Bolton Ambulance case such as changing its base of operations, compared to Fanshawe College, there can be no question that the Ministry sets forth the basic requirements of an ambulance service and has the power to enforce these. In addition, the ambulance service must report its operations to the Ministry and the Ministry has control over a vast number of operations through the relevant statutes and regulations.

As a result, the Tribunal comes to the conclusion that the Bolton and District Voluntary Ambulance Association is an agent of the Crown and as a result, the Crown Employees Collective Bargaining Act governs the relationship between the Employees and the Crown.

Dated at Toronto, Ontario this 17th day of August, 1992.

Graeme H. McKechnie, Chair

M. Sullivan, Member

D. Guptill, Member

APPENDIX A

T/0068/91

THE CROWN EMPLOYEES' COLLECTIVE BARGAINING ACT

APPLICATION FOR REPRESENTATION RIGHTS
BEFORE THE ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

B E T W E E N:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

Applicant

and

THE CROWN IN RIGHT OF ONTARIO as represented by
the MINISTRY OF HEALTH, and
BOLTON AND DISTRICT VOLUNTARY AMBULANCE ASSOCIATION

Respondents

AGREED STATEMENT OF FACTS

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Barristers and Solicitors
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Ian Roland
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Solicitors for Applicant

TO: MATHEWS, DINSDALE & CLARK
Barristers and Solicitors
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Toronto. Ontario M5C 2Z1

(416) 862-8280
Linda Coulter

Solicitors for the Respondent
Bolton and District Voluntary
Ambulance Association

T/0068/91

THE CROWN EMPLOYEES' COLLECTIVE BARGAINING ACT

APPLICATION FOR REPRESENTATION RIGHTS
BEFORE THE ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

B E T W E E N:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

Applicant

and

THE CROWN IN RIGHT OF ONTARIO as represented by
the MINISTRY OF HEALTH, and
BOLTON AND DISTRICT VOLUNTARY AMBULANCE ASSOCIATION

Respondents

AGREED STATEMENT OF FACTS

1. The Applicant, the Ontario Public Service Employees Union, (hereinafter "OPSEU"), is an employee organization as defined under section 1 of the Crown Employees Collective Bargaining Act. OPSEU made an application to the Ontario Public Service Labour Relations Tribunal on January 10, 1992 for representation rights as bargaining agent for the Employees of the Respondents, Bolton and District Voluntary Ambulance Association ("BDVAA"). The detailed description of the unit of employees of the Respondents that the Applicant

claims to be appropriate for collective bargaining is set out at paragraph 2 of the application. For convenience sake, it is set out here in full:

> (a) all employees of Bolton and District Ambulance Association, save and except those persons who are not employees within the meaning of clause (f) of ss.1, s.1 of the Crown Employees Bargaining Act, R.S.O. 1980, c.108, as amended.

Attached hereto and marked as Exhibit "A" to this Agreed Statement of Facts is a true copy of the application dated January 10, 1992.

2. BDVAA is an association incorporated pursuant to the Corporation Act, R.S.O. 1980, c. 95. BDVAA operates an ambulance service in or about the Town of Caledon and surrounding areas in the Province of Ontario, including Bolton, Caledon East, Palgrave, and Castlemore. BDVAA was formally incorporated pursuant to Letters Patent issued on May 19, 1961. The Constitution of BDVAA was adopted on January 7, 1983 and was most recently amended on November 28, 1990. Attached hereto as Exhibit "B" to this Agreed Statement of Facts is a copy of the Letters Patent dated May 19, 1961. Attached hereto as Exhibit "C" to this Agreed Statement of Facts is a copy of the Constitution of BDVAA, as amended.

3. As of January 10, 1992, BDVAA employed 4 persons, including 2 full-time ambulance officers, a secretary/treasurer, and a Co-ordinator, who also works as an ambulance attendant.

4. There are presently five types of ambulances services operated in the Province of Ontario. Ambulance services may be provided:

(a) by the Ministry of Health (the "Ministry"),

(b) by a hospital,

(c) by a municipality,

(d) by a volunteer organization or

(e) by an individual or corporation.

5. The Ministry licenses all of the operators of ambulance services apart from the services provided by it. Attached hereto as Exhibit "D" to this Agreed Statement of Facts is a copy of the most recent ambulance service licence issued to BDVAA on March 31, 1992 signed by the "Director", Ambulance Services Branch, Ministry of Health.

6. Under the Health Insurance Act, all ambulance services rendered to insured persons are "insured services" and, accordingly, insured persons are entitled to have such services paid for by the Ministry on their behalf, (which may be subject to a co-payment by the insured person). Under section 34 of the **Health Insurance Act**, R.S.O. 1980, c.197 and clause 6(1)(e) of the **Ministry of Health Act**, R.S.O. 1980, c.280 the amount payable by the Ministry to BDVAA in respect of the insured services provided by BDVAA are paid in the form of payment of "all or any part of annual expenditures" of BDVAA.

The payment for services provided is set out in clause 4(1)(f) of the Ambulance Act, R.S.O. 1980, c.20.

7. In order to obtain its annual funding from the Ministry, each year BDVAA submits an estimate of its projected expenditures in the following year for the provision of ambulance services. The estimate is reviewed by the Ministry, and the Ministry determines the amount to be paid to BDVAA during the following year. The total amount is provided to BDVAA in instalments over the year and is subject to adjustment after the end of the year based on BDVAA's cost of provided ambulance services in that year.

8. The amount provided annually by the Ministry does not include any amount to pay the cost of management of the service.

9. Attached as Exhibit "E" to this Agreed Statement of Facts is a copy of the "19910/92 Ambulance Allocation Detail Report". It is the proposed budget of the BDVAA prepared by the Ministry of Health. The BDVAA is required to provide information regarding the projected volume of calls for the various types of codes and the projected total kilometres. The Report has space provided for the local Services to make requests that differ from those prepared by the Ministry of Health, and further space for "Regional Office Review" by the Ministry of Health of such additional requests. Attached

as Exhibit "F" to this Agreed Statement of Facts is a copy of the "1990/91 Total Authorized Budget".

10. The BDVAA operates one staffed ambulance vehicle in and about the Town of Caledon, and the surrounding area. The BDVAA has one ambulance station located in Bolton, Ontario. The ambulance is to be used as required by the Ministry of Health in the Town of Caledon or anywhere in the Province of Ontario. The ambulance, and virtuality all of the equipment in the ambulance, including radio equipment, is owned by Her Majesty the Queen in Right of Ontario. Attached hereto as Exhibit "G" is a copy of the Vehicle Permit for the BDVAA's ambulance. The V.I.N. is 2B7KB31ZXLK735217, and the owners name thereon is "Her Majesty the Queen in Right of Ontario, Ministry of Health."

11. The ambulance operated by BDVAA is painted with some markings as required by Schedule 1 of Regulation 14 under the Ambulance Act, R.S.O. 1980, c.20 and, in addition, have the Province of Ontario crest and the words, "Ministry of Health" on each door.

12. Attached hereto as Appendix "H" to this Agreed Statement of Facts is a manual entitled the "Ambulance Call Report Manual: A.C.R." This Ministry manual replaced the "O.A.S.I.S. Manual for the A.S.5-A" in March 1989. The A.C.R. Manual sets out the province-wide requirements for the documentation by Emergency Medical Attendants of

the movement of ambulances and casualty care rendered to patients in Ontario.

13. The A.C.R. Manual requires documentation of any movement of an ambulance vehicle, except standby, maintenance, and administrative runs, and of any care given to a patient to be recorded on the Ambulance Call Report form, jointly by both crew members.

14. Included in the A.C.R. Manual is the Ambulance Call Report form. The ambulance attendants are responsible for completing the form, with the exception of the "Billing Stub", which is generally completed by hospital staff or other ambulance service personnel.

15. The system of ambulance dispatch for the BDVAA is run by the Ministry of Health through centralized dispatch systems, known as Central Ambulance Communications Centres ("CACC's").

16. The movement of ambulances at BDVAA is entirely directed and controlled by Ministry CACC's. The primary responsibility for dispatching BDVAA ambulances lies with the Mississauga CACC, but the Metropolitan Toronto, and Georgian CACCs also dispatch BDVAA ambulances.

17. The personnel employed in the CACC's are Ministry of Health public servants.

18. Ambulances may only be moved if authority to do so is obtained from the dispatchers employed by the Ministry.

19. All calls for ambulances from the consuming public come through the dispatch system. In a low percentage of instances an emergency call, normally a local call, might happen to come directly into one of BDVAA telephone lines. In such a case a vehicle would be dispatched only after notification had been given to, and authorization received from, Central Dispatch; the movement of the vehicle would then be monitored directly by Central Dispatch. BDVAA is prohibited from using or permitting to be used any telephone lines under its control for the purpose of receiving calls for ambulance service and must not advertise or hold out any telephone number to call for ambulance service except the number of the Ministry's communications centre.

20. The dispatch service itself may bring ambulances from other services into the BDVAA service area to assist or may take the ambulance from BDVAA areas to assist other services in providing ambulance services.

21. Attached hereto as Exhibit "I" to this Agreed Statement of Facts is a document entitled "Central Ambulance Communications Centre Manual". This manual is prepared by the Ministry of Health for use by its dispatchers at its dispatch centres throughout the Province. The C.A.C.C. Manual includes general instructions and directions to ambulance personnel employed by the Ministry with respect to the various procedures set out therein.

22. The C.A.C.C. Manual includes instructions and specific directions to dispatch personnel employed by the Ministry with respect to the various policies and procedures set out therein concerning individual ambulance Services, including the BDVAA.

23. On the 10th day of January, 1985, Mr. Malcom Bates of the Ambulance Services Branch of the Ministry of Health, forwarded to all the ambulance operators a series of financial policies and procedures together with a standard for ambulance services management. This documentation is referred to as "Quality of Ambulance Service Management/Financial Policies and Procedures" (Q.A.S.M.F.P.P.). Attached hereto as Exhibit "J" is the Q.A.S.M.F.P.P. document.

The covering letter to this consolidation of policies and procedures dated January 10, 1985 provides as follows:

Ontario Ministry of Health
January 10, 1985

MEMORANDUM

TO: All Ambulance Services
(excluding A.S.B. Services)

FROM: Malcom Bates
Manager
Land Ambulance

RE: The Quality of Ambulance Service Management/Financial Policies and Procedures

It is the intention of Emergency Health Services to assist all operators and their accountants/auditors in fully comprehending the methods and procedures which will result in the provision of good ambulance service management.

Enclosed herewith, therefore, you will find a manual inclusive of:

1) a section addressed to service operators describing the expectations of Emergency Health Services with respect to the management quality of an ambulance service;

2) a section of Financial Policies and Procedures which, in complementing the Ambulance Act and Regulation 14, provides a concise financial reference for ambulance service operators functioning through transfer payments. I would urge you to carefully read both of these sections, paying particular attention to any discrepancies you may detect that exist between the procedures/policies that your service now follows and those contained in the enclosed items; any such differences should be

> referred to your Regional Manager or Assistant Regional Manager immediately. Further, please also bring to the attention of your Regional/Assistant Regional Manager any matters which you believe should be clarified in the Financial Manual.
>
> Your comments to your Regional Management are welcomed.
>
> "Malcom Bates"

24. The BDVAA, like other ambulance services, is obliged to submit "Quarterly Financial Statements" to the Ministry of Health. Attached hereto as Exhibit "K" to the Agreed Statement of Facts is a copy of the Quarterly Financial Statement form to be submitted to the Ministry.

25. The Ministry of Health, through its Emergency Health Services Branch, administers an identification card program for all persons employed by Ambulance Services in Ontario. Attached hereto as Exhibit "L" to this Agreed Statement of Facts is a copy of an "Ambulance Identification Card Application" and three pages of instructions for completing the ambulance identification card program application. On the reverse side of the Ambulance Identification Card Application there is to be found a "Consent to Disclosure of Criminal Record Information". This form, which must be filled in by all applicants for the Ambulance Identification Card, requires that each applicant authorize "The Ontario Provincial Police Force (The O.P.P.) to release to Manager, Inspection and Investigation

Service, Ministry of Health such records of criminal convictions for which a pardon has not been granted, and records of outstanding criminal charges of which the O.P.P. is aware".

26. BDVAA and the Town of Caledon are parties to an agreement entitled "Document of Understanding" which is dated March 10, 1992. The document defines the parties' respective responsibilities regarding the property and building known as the "Ambulance Station" situated at 28 Ann Street, Bolton, Ontario. The 28 Ann Street property is owned by the Town of Caledon and the Ambulance Station was constructed in 1989. BDVAA collected and donated money to the Town of Caledon for the express purpose of contributing to the cost of constructing the Ambulance Station. BDVAA decided not to request a loan from the Ministry for the construction of the new building as it wanted to maintain control over the facility and the funding process. Attached hereto as Exhibit "M" is a copy of the Document of Understanding dated March 10, 1992.

27. BDVAA's original Ambulance Hall was built on Chapel Street in 1972. The building consisted only of a Bay Area and was built on Region of Peel land.

28. Attached hereto as Exhibit "N" is a copy of an extract from the minutes of the January 10, 1978 BDVAA Annual Meeting and a sketch. At page 4 of these minutes is a record of a proposal

concerning renovations to the old hall. The attached sketch illustrates the changes.

29. Attached hereto as Exhibit "O" is a copy of the minutes of the September 12, 1978 BDVAA Annual Meeting. Those present at the meeting agreed by motion to obtain a $10,000.00 loan to be used for the purpose of erecting the addition. The BDVAA did not seek Ministry approval for this loan and did not request the loan from the Ministry. Also referenced in the minutes are discussions relating to fund raising efforts. It was agreed that BDVAA would hold a "Dance and Car Draw", the proceeds to be used to alleviate the $10,000.00 loan.

30. Following the "Dance and Car Draw", BDVAA was sued for improperly administering the draw. The terms of the draw were such that the last ballot in the drum would be the winning ballot. The plaintiff successfully claimed that the winning ballot was not the last ballot in the drum. BDVAA was required to provide the plaintiff with another car. Donations were made to BDVAA to cover the cost of the car.

31. In 1984, the Board of Directors discussed the need for renovations and ambulance expansion and the replacement of the existing facility. A feasibility study had been undertaken in the previous year. It was decided by the Executive that BDVAA should

enquire about expanding the existing facility further into land owned by the Ontario Water Resources Commission. Attached hereto as Exhibit "P" is an extract from the Minutes of the January 15, 1984 Annual Meeting, which makes reference to the proposed renovations.

32. Attached hereto as Exhibit "Q" is a copy of the Minutes of a General Meeting held November 24, 1985. The minutes indicate BDVAA's decision to expand the existing base. BDVAA chose to add a second floor to the existing base.

33. Attached as Exhibit "R" and "S" respectively, are copies of the Minutes from the May 22, 1986 Executive Meeting and the June 18, 1986 Executive Meeting which contain references to fund raising efforts and other donations to the building. The BDVAA did not seek Ministry assistance for the building of the addition, but rather, BDVAA appealed to the community through fund raising.

34. Attached hereto as Exhibit "T" is a copy of Minutes from the November 24, 1986 Executive Meeting indicating a delay in construction of the addition due to the Region's desire to add a well. The Minutes refer to an invitation from the O.P.P. and Fire Department to join them in a new town building at a cost to BDVAA of $100,000.00. The BDVAA would own that building for as long as it remained there.

35. In January 1987, due to Peel Region's desire to build a well, BDVAA decided to move to the new building. The Ministry was not consulted in making this decision. Attached as Exhibit "U" is a copy of Minutes of the January 25, 1987 Annual Meeting during which expansion plans were dissolved and a decision was made to relocate BDVAA to the proposed Town of Caledon Building. The Minutes also refer to fund raising efforts by the rotary club.

36. Construction of the new building was commenced in early 1988 and was scheduled to be completed in late May of 1988.

37. On November 23, 1989, BDVAA paid the Town of Caledon $100,000.00 for the building. Attached as Exhibit "V" is a copy of the cheque payable to the Town.

38. In February 1989, BDVAA held a meeting with its members regarding the disposition of the old hall. Attached hereto as Exhibit "W" is the agenda of this meeting as well as a letter dated March 17, 1989 from BDVAA to the Town regarding such disposition. The Ministry was not part of this decision to donate the facility to the Town of Caledon.

39. In July of 1990, BDVAA determined that it required a computer system. The BDVAA requested the donation of a personal computer from IBM. On July 9, 1990, Mrs. Martin received

confirmation that IBM would be donating a personal computer. The Ministry has not provided a computer for BDVAA's use. Attached hereto as Exhibit "X" is a copy of the letter dated July 9, 1990 addressed to Mrs. Martin.

Ontario Public Service
Labour
Relations
Tribunal

Fonction publique de l'Ontario
Tribunal administratif
des relations
de travail

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T/0068/91-2

T/0068/91

IN THE MATTER OF AN APPLICATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario
as represented by the Ministry of Health
and Bolton and Distict Voluntary Ambulance Association

Respondent

BEFORE:	G. McKechnie	Vice-Chairperson
	M. Sullivan	Member
	B. Gallivan	Member

FOR THE COMPLAINANT: I. Roland
Counsel
Gowling, Strathy & Henderson
Barristers & Solicitors

FOR THE RESPONDENT: E. Keenan
Counsel
Mathews Dinsdale & Clark
Barristers & Solicitors

HEARING: May 19, 1992

DECISION

1. By Interim Decision dated February 24, 1992, the Tribunal ordered a pre-hearing representation vote to be taken of the voting constituency set out in the application for representation rights.

2. The vote was held March 25, 1992 and the parties agreed to and signed a waiver of a formal hearing on all matters except the question of whether Dianne Nordeheimer is excluded from, or included in, the bargaining unit. The parties also agreed to an immediate counting of the ballots cast in the representation vote. The ballot of Dianne Nordeheimer was segregated pending the determination of her status.

3. More than fifty percent (50%) of the ballots cast in the representation vote, excluding Dianne Nordeheimer's ballot, were cast in favour of the Applicant. The Tribunal has determined, based on the vote, that the Applicant's right to certification cannot be affected by the Tribunal's ultimate decision as to the inclusion or exclusion of the disputed ballot.

4. Having regard to the fact that the parties agreed to waive a formal hearing on all matters except the question of Dianne Nordeheimer's inclusion in, or exclusion from, the bargaining unit, and given that the outcome of the vote in favour of the Applicant will not be affected by the ultimate decision regarding Dianne Nordeheimer's status, the Tribunal hereby grants Interim Representation Rights to the Applicant with respect to the bargaining unit described in paragraph 3 of the Interim Decision of the Tribunal dated July 14, 1992.

...../2

5. A final certificate and final description of the bargaining unit must await the determination of whether Dianne Nordeheimer is included in, or excluded, from the Bargaining unit.

6. The Registrar is directed to destroy the ballots cast in the representation vote no earlier than thirty (30) days from the date of this decision unless representations to the contrary are received from any party.

Dated at Toronto, Ontario this 17th day of February 1993.

Graeme H. McKechnie, Vice-Chair

Member, M. Sullivan

Member, B. Gallivan

Ontario Public Service Labour Relations Tribunal
Fonction publique de l'Ontario Tribunal administratif des relations de travail

180 Dundas Street West, Suite 2100, Toronto, Ontario M5G 1Z8
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T/0068/91-3

T/0068/91

IN THE MATTER OF AN APPLICATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario
Bolton & District Voluntary Ambulance Association

Respondent

BEFORE:	G. McKechnie	Vice-Chairperson
	M. Sullivan	Member
	D. Guptill	Member
FOR THE APPLICANT:	I Roland Counsel Gowling, Strathy & Henderson Barristers & Solicitors	
FOR THE RESPONDENT:	E. Keenan Cousel Mathews, Dinsdale & Clark Barristers & Solicitors	
HEARING:	May 19, 1992 April 8, 1993 June 2, 1993	

DECISION

1. By Decision dated February 17, 1993, the Tribunal granted interim representation rights to the Applicant and decided that the final certificate and description of the bargaining unit would await the determination of whether Dianne Nordeheimer was to be included in the bargaining unit.

2. A hearing into the matter of inclusion or exclusion of Dianne Nordeheimer was held June 2, 1993. At the hearing, the Respondent employer withdrew its objection to Dianne Nordeheimer's inclusion in the bargaining unit.

3. As a result, the Tribunal grants representation rights to the Applicant with respect to the bargaining unit described in paragraph 3 of the Interim Decision of the Tribunal dated July 14, 1992.

Dated this 10th day of June, 1993 at Toronto, Ontario

Graeme H. McKechnie, Vice Chair

Michael Sullivan, Member

David Guptill, Member

T/0069/91-1

Ontario Public Service
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T/0069/91

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, R.S.O. 1980, C.108

ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

Between

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario
as represented by the Ministry of Health and
Nobleton Ambulance Association

Respondents

BEFORE:	G. McKechnie	Chairperson
	M. Sullivan	Member
	J. Coups	Member
FOR THE APPLICANT:	S. White Counsel Gowling, Strathy & Henderson Barristers & Solicitors	
FOR THE RESPONDENT:	H. Rolph Counsel McMillan Binch Barristers & Solicitors	
DATE OF HEARING:	October 23, 1992	

The Ontario Public Service Employees Union, (OPSEU), pursuant to the Crown Employees Collective Bargaining Act, (ACT) has applied to the Tribunal for determination of the status of the employees of the Nobleton Ambulance Association. The Nobleton Ambulance Association (Respondents) have replied that their position is that Nobleton is not a Crown agency and therefore not subject to the Crown Employees Collective Bargaining Act.

The parties submitted an Agreed Statement of Facts which is appended to this decision as Schedule A. Mr. Lorne Rosen who was President and Manager of the Nobleton Ambulance Association, testified that he had been with the Respondents for approximately six years, beginning as a voluntary ambulance attendant and through election by the members, had accepted executive positions. He stated that the Nobleton Ambulance Association was incorporated as a non-profit corporation in 1987 and prior to that, it was an unincorporated voluntary ambulance association. He testified that the contributions made by volunteers were a significant feature of the ambulance service. In addition, he testified to the relationship between the Respondents and the Ministry of Health. In the Agreed Statement of Facts, at paragraph 31, it is noted that the building out of which the Association operates was renovated under a grant from the Ministry of Health. He stated that the Ministry of Health requested that an additional vehicle be utilized and to accommodate that, renovations were needed to the building. Mr. Rosen testified that the Association presented bills to the Ministry for payment, but agreed that the Ministry could deny funds should it so desire. Mr. Rosen also testified that the Ministry of Health exercised control over expenditures and required the submission of audited financial statements as a condition of retaining the licence to operate an ambulance association. Mr. Rosen stated that the Nobleton Ambulance Association was part of the central ambulance communication centre from which ambulances were dispatched.

The Union argued that the onus is on the Employer to demonstrate that there is a difference between the Nobleton Ambulance Association and other ambulance associations that have been found to be Crown agencies by the Tribunal. In particular, the Union referred the Tribunal to re: Ontario Public Service Employees Union and The Bolton and District Voluntary Ambulance Association (Decision dated August 17, 1992); re: Ontario Public Service Employees Union and Lindsay and District Ambulance Service (Decision dated April 8, 1991); re: Ontario Public Service Employees Union and McKechnie Ambulance Services Inc. (Decision dated November 30, 1989). In all cases, the Union argued that the ambulance services were found to be subject to the Crown Employees Collective Bargaining Act.

The Union argued that the existence of a large number of volunteers did not change the principles set forth in the decision in McKechnie Ambulance. In the Union's view, the Bolton Ambulance case put forward the proposition that volunteer members of an ambulance association did not change the fact that the Union sought only to organize employees. The existence of volunteers, therefore, did not remove an ambulance service from the jurisdiction of the Crown Employees Collective Bargaining Act. In addition, the Union pointed to various documents tendered as Exhibits in the instant proceedings to demonstrate that the Ministry of Health exercised such a significant degree of control over the instant ambulance service that the Tribunal must find the Respondent ambulance association is a Crown agency. The Union also referred the Tribunal to the Ambulance Act RSO 1980 c 20, as amended, and in particular, section 4 in which the duties and powers of the Minister of Health are detailed.

The Respondents argued that each case should be judged on its merits and the Tribunal should not slavishly follow the earlier four cases. It was the Respondent's argument that because the ambulance service deals in health care, it is not unusual for the

government to issue regulations and oversee the provision of such services. The Respondent argued that it is incorrect to look at the statute to see if the ambulance service is a Crown agent. Rather, one should look at whether or not the government "operates the service." In the Respondent's view, there are distinctions between the McKechnie Ambulance case and Nobleton. In the Nobleton case, it is a voluntary non-profit service and paragraph 11 of the Agreed Facts demonstrates that 51.8% of the total hours were provided by volunteers. In the Respondent's view, the volunteers make a contribution to the service of labour and the Township of King provides the hall for a rental of $1.00 per year. The Respondents argue therefore, that there is really a partnership between the community and the government and this is qualitatively different from McKechnie Ambulance. It means therefore, in the Respondent's view, that Nobleton Ambulance Association has a degree of independence and this makes it no longer a Crown agent. It is the Respondent's view that in the McKechnie Ambulance case, the question was whether the service was a Crown agent managed by McKechnie and in the instant situation, it is the Respondent's argument that there is a joint venture.

The Respondent also argued that in the case of re: Bolton Ambulance Service, the Tribunal did not address the economic contribution of volunteers in an appropriate manner. It is the Respondent's view that one cannot look only at a managerial style but must look at a joint venture principle.

The Respondent also argued that the Nobleton Ambulance Association has not taken the position that it is opposing the organization of its employees, rather it complains about its designation as a Crown agency. In the Respondent's view, there is more flexibility for it to preserve the voluntary nature of the ambulance service under a different statute than would be the case under the Crown Employees Collective Bargaining Act.

Finally, the Respondents argued that Bill 169, an act to amend the Public Service Act and Crown Employees Collective Bargaining Act had received first reading and should the Tribunal not find its other arguments persuasive, the Tribunal should adjourn its decision pending the finalization of Bill 169.

The Tribunal has reviewed the agreed Statement of Facts, the viva voce evidence of Mr. Rosen and the arguments put forward by the Respondent. The Tribunal has consistently held that there must be facts to distinguish a particular ambulance service from the McKechnie Ambulance case in order for the Tribunal to find that a respondent is not a Crown agent. In the instant case, the Tribunal recognizes the contribution made by voluntary members of the Nobleton Ambulance Association and recognizes that, in the time period covered by the Agreed Statement of Facts, volunteers contributed more than 50% of attendants' time. However, it is the Tribunal's view that the facts in the Nobleton Ambulance case are not different from those in the Bolton case and are not different from the general principles laid down by the McKechnie Ambulance decision. Although the Respondents put forward the argument that there was a partnership between the community and the government, the Tribunal finds that the degree of control, in particular, and the other tests that were applied in the McKechnie Ambulance case are appropriate in the Nobleton Ambulance Association matter and as result, comes to the conclusion that the Nobleton Ambulance Association is an agent of the Crown and as a result, the Crown Employees Collective Bargaining Act governs the relationship.

Finally, Bill 169 has not proceeded to statute form. The Tribunal finds no reason to delay its decision on this basis.

As a result, the Tribunal finds that the employees of the Nobleton Ambulance Association are employees, pursuant to the Act.

Dated at Toronto, Ontario this 13th day of January 1993.

Graeme H. McKechnie, Vice-Chair

M. Sullivan, Member

J. Coups, Member

SCHEDULE A

* Please note there is no page 2, the agreed facts are complete as attached.

T/0069/91

THE CROWN EMPLOYEES' COLLECTIVE BARGAINING ACT

APPLICATION FOR REPRESENTATION RIGHTS
BEFORE THE ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

B E T W E E N:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

Applicant

and

THE CROWN IN RIGHT OF ONTARIO as represented by
the MINISTRY OF HEALTH, and
NOBLETON AMBULANCE ASSOCIATION

Respondents

AGREED STATEMENT OF FACTS

1. The Applicant, the Ontario Public Service Employees Union, (hereinafter "OPSEU"), is an employee organization as defined under section 1 of the Crown Employees Collective Bargaining Act. OPSEU made an application to the Ontario Public Service Labour Relations Tribunal on January 9, 1992 for representation rights as bargaining agent for the Employees of the Respondents, Nobleton Ambulance Association ("the Association"). The detailed description of the unit of employees of the Respondents that the Applicant claims to be appropriate for collective bargaining is set out at paragraph 2 of the application. For convenience sake, it is set out here in full:

(a) all employees of Nobleton Ambulance Association, save and except those persons who are not employees within the meaning of clause (f) of ss.1, s.1 of the Crown Employees Bargaining Act, R.S.O. 1980, c.108, as amended.

Attached hereto and marked as Exhibit "A" to this Agreed Statement of Facts is a true copy of the application dated January 9, 1992.

2. The Association was incorporated as a non-profit corporation, pursuant to the Corporation Act, R.S.O. 1980, c.95, on March 17, 1987. The Association operates an ambulance service in or about the communities of King Township and the City of Vaughan, in the Province of Ontario. The most current amendment to the by-laws of the Association came into force on December 18, 1991. Attached hereto as Exhibit "B" to this Agreed Statement of Facts are copies of the letters patent dated March 17, 1987. A copy of the current By-laws of the Association are attached hereto as Exhibit "C".

3. As of January 9, 1992, the Association employed 3 full-time and 6 part-time ambulance officers, as well as a bookkeeper, all of whom were appropriate for collective bargaining.

4. There are presently five types of ambulances services operated in the Province of Ontario. Ambulance services may be provided:

(a) by the Ministry of Health (the "Ministry"),

(b) by a hospital,

(c) by a municipality,

(d) by a volunteer organization or

(e) by an individual or corporation.

5. The Ministry licenses all of the operators of ambulance services apart from the services provided by it. Attached hereto as Exhibit "D" to this Agreed Statement of Facts is a copy of the 1991-1992 ambulance service licence issued to the Association on March 4, 1991 signed by the "Director", Ambulance Services Branch, Ministry of Health.

6. Under the Health Insurance Act, all ambulance services rendered to insured persons are "insured services" and, accordingly, insured persons are entitled to have such services paid for by the Ministry on their behalf, (which may be subject to a co-payment by the insured person). Under section 34 of the **Health Insurance Act**, R.S.O. 1980, c.197 and clause 6(1)(e) of the **Ministry of Health Act**, R.S.O. 1980, c.280 the amount payable by the Ministry to the Association in respect of the insured services provided by the Association are paid in the form of payment of "all or any part of annual expenditures" of the Association. The payment for services provided is set out in clause 4(1)(f) of the **Ambulance Act**, R.S.O. 1980, c.20.

7. The Association is managed by a three-person Board of Directors who are elected by its volunteer members. All directors must themselves be volunteer members and serve without remuneration. One of the Directors is elected by his or her fellow Directors as President of the association and also holds the title of "Manager" of the corporation. The President is the Chief Executive Officer of the Association and is generally charged with supervising and managing its affairs. The Directors, the President and the other Officers of the Association are all volunteer members and are unpaid for their work. The annual funding by the Ministry does not include any Management Compensation Plan.

8. The Association employs a Co-ordinator and a supervisor who are responsible for the day to day management and operation of the Association's ambulance service, subject to direction from the President. The Association pays the Co-ordinator's and the supervisor's salary from operational funds received from the Ministry.

9. Subject to the Ambulance Act and Regulations, all of the employees are hired, disciplined, and fired by the Association without any involvement by the Ministry. All final decisions regarding hiring and firing are taken by the Board of Directors, with the Co-ordinator and Supervisor playing a significant role in the process.

10. The Association first hired employees in and about September, 1987 when it hired a Co-ordinator, one full-time Emergency Medical Attendant, and two part-time Emergency Medical Attendants. During the ensuing four-year period, there has been a gradual increase to the present compliment of 12 employees. The Ministry provides the funding for all salaries and benefits of all the Association's employees.

11. During its 1991-1992 fiscal year which ended March 30, 1992, the Association provided 23,750 hours of service by Emergency Medical Attendants. Eleven thousand four hundred and thirty-two (11,432) of these hours, or 49.2% of the total, were provided by the employees of the Association. The remaining 12,318 hours, or 51.8% of the total were provided by volunteer members.

12. In order to obtain its annual funding from the Ministry, each year the Association submits an estimate of its projected expenditures in the following year for the provision of ambulance services. The estimate is reviewed by the Ministry, and the Ministry determines the amount to be paid to the Association during the following year. The total amount is provided to the Association in instalments over the year and is subject to adjustment after the end of the year based on the Association's cost of provided ambulance services in that year. The Board of Directors of the association, and in particular the President of the Association, prepares the budget estimates submitted by the Ministry of Health and negotiates the final approved annual budget.

13. Attached as Exhibit "E" to this Agreed Statement of Facts is a copy of the "1991/92 Ambulance Allocation Detail Report". It is the proposed budget of the Association prepared by the Ministry of Health. The Association is required to provide information regarding the projected volume of calls for the various types of codes and the projected total kilometres. The Report has space provided for the local Services to make requests that differ from those prepared by the Ministry of Health, and further space for "Regional Office Review" by the Ministry of Health of such additional requests. Attached as Exhibit "F" to this Agreed Statement of Facts is a copy of the "1991/92 Total Approved Budget".

14. The Ambulance Service operates three staffed ambulance vehicles primarily in and about Nobleton and the Ministry's Central East (Region 3) area. The Association has one ambulance station in Nobleton. There are a total of three ambulance vehicles stationed in Nobleton, made up of two operating vehicles and one service spare. One vehicle provides emergency coverage for king Township and the City of Vaughan while the other operating vehicle provides regional transfer service in the Ministry's Central East (Region 3) area. All of the ambulances are to be used as required by the Ministry of Health in the Mississauga and Barrie Districts of the Ministry of Health. All of the ambulances and virtuality all of the equipment in the three ambulances, including radio equipment, are owned by Her Majesty the Queen in Right of Ontario. Attached hereto as Exhibit "G" is a copy of the Vehicle Permit for one of the Association's ambulances. The V.I.N. is 2B7KB33W5JK147841, and the owner's name thereon is "Her Majesty the Queen in Right of Ontario, Ministry of Health."

15. The ambulances operated by the Association are painted with some markings as required by Schedule 1 of Regulation 14 under the Ambulance Act, R.S.O. 1980, c.20 and, in addition, have the Province of Ontario crest and the words, "Ministry of Health" on each door.

16. Attached hereto as Exhibit "H" to this Agreed Statement of Facts is a manual entitled the "Ambulance Call Report Manual: A.C.R." This Ministry manual replaced the "O.A.S.I.S. Manual for the A.S.5-A" in March 1989. The A.C.R. Manual sets out the province-wide requirements for the documentation by Emergency Medical Attendants of the movement of ambulances and casualty care rendered to patients in Ontario.

17. The A.C.R. Manual requires documentation of any movement of an ambulance vehicle, except standby, maintenance, and administrative runs, and of any care given to a patient to be recorded on the Ambulance Call Report form, jointly by both crew members.

18. Included in the A.C.R. Manual is the Ambulance Call Report form. The ambulance attendants are responsible for completing the form, with the exception of the "Billing Stub", which is generally completed by hospital staff or other ambulance service personnel.

19. The system of ambulance dispatch for the Association is run by the Ministry of Health through two centralized dispatch systems located in Mississauga and Barrie, and known as the Mississauga Central Ambulance Communications Centre and Georgian Central Ambulance Communications Centre, respectively.

20. The movement of ambulances at the Association's ambulance service in its area is entirely directed and controlled by the Mississauga and the Georgian Central Ambulance Communications Centres.

21. The personnel employed in the central area dispatch service are Ministry of Health public servants.

22. Ambulances may only be moved in their call area if authority to do so is obtained from the dispatchers employed by the Ministry.

23. All calls for ambulances from the consuming public come through the dispatch system. In a low percentage of instances an emergency call, normally a local call, might happen to come directly into one of the Association's telephone lines. In such a case a vehicle would be dispatched only after notification had been given to, and authorization received from, Central Dispatch; the movement of the vehicle would then be monitored directly by Central Dispatch. The Association is prohibited from using or permitting to be used any telephone lines under its control for the purpose of receiving calls for ambulance

service and must not advertise or hold out any telephone number to call for ambulance service except the number of the Ministry's communications centre.

24. The dispatch service itself may bring ambulances from other services into the Association's service area to assist or may take ambulances from the Association's areas to assist other services in providing ambulance services.

25. Attached hereto as Exhibit "I" to this Agreed Statement of Facts is a document entitled "Central Ambulance Communications Centre Manual". This manual is prepared by the Ministry of Health for use by its dispatchers at its dispatch centres throughout the Province. The C.A.C.C. Manual includes general instructions and directions to ambulance personnel employed by the Ministry with respect to the various procedures set out therein.

26. The C.A.C.C. Manual includes instructions and specific directions to dispatch personnel employed by the Ministry with respect to the various policies and procedures set out therein concerning individual ambulance services, including the Association.

27. On the 10th day of January, 1985, Mr. Malcom Bates of the Ambulance Services Branch of the Ministry of Health, forwarded to all the ambulance operators a series of financial policies and procedures together with a standard for ambulance services management. This documentation is referred to as "Quality of Ambulance Service Management/Financial Policies and Procedures" (Q.A.S.M.F.P.P.). Attached hereto as Exhibit "J" is the Q.A.S.M.F.P.P. document.

The covering letter to this consolidation of policies and procedures dated January 10, 1985 provides as follows:

> Ontario Ministry of Health
> January 10, 1985
>
> MEMORANDUM
>
> TO: All Ambulance Services
> (excluding A.S.B. Services)
>
> FROM: Malcom Bates
> Manager
> Land Ambulance
>
> RE: The Quality of Ambulance Service Management/Financial Policies and Procedures
>
> It is the intention of Emergency Health Services to assist all operators and their accountants/auditors in fully comprehending the methods and procedures which will result in the provision of good ambulance service management.
>
> Enclosed herewith, therefore, you will find a manual inclusive of:

1) a section addressed to service operators describing the expectations of Emergency Health Services with respect to the management quality of an ambulance service;

2) a section of Financial Policies and Procedures which, in complementing the Ambulance Act and Regulation 14, provides a concise financial reference for ambulance service operators functioning through transfer payments.

I would urge you to carefully read both of these sections, paying particular attention to any discrepancies you may detect that exist between the procedures/policies that your service now follows and those contained in the enclosed items; any such differences should be referred to your Regional Manager or Assistant Regional Manager immediately. Further, please also bring to the attention of your Regional/Assistant Regional Manager any matters which you believe should be clarified in the Financial Manual.
Your comments to your Regional Management are welcomed.

"Malcom Bates"

28. The Association, like other ambulance services, is obliged to submit "Quarterly Financial Statements" to the Ministry of Health. Attached hereto as Exhibit "K" to the Agreed Statement of Facts is a copy of the Quarterly Financial Statement for the third quarter of fiscal year 1991-1992 which was submitted to the Ministry.

29. The Ministry of Health, through its Emergency Health Services Branch, administrates an identification card program for all persons employed by Ambulance Services in Ontario. Attached hereto as Exhibit "L" to this Agreed Statement of Facts is a copy of an "Ambulance Identification Card Application" and three pages of instructions for completing the ambulance identification card program application. On the reverse side of

the Ambulance Identification Card Application there is to be found a "Consent to Disclosure of Criminal Record Information". This form, which must be filled in by all applicants for the Ambulance Identification Card, requires that each applicant authorize "The Ontario Provincial Police Force (The O.P.P.) to release to Manager, Inspection and Investigation Service, Ministry of Health such records of criminal convictions for which a pardon has not been granted, and records of outstanding criminal charges of which the O.P.P. is aware".

30. All the "full" volunteer members of the Association have attained certification as Emergency Medical Attendants under the Ambulance Act. All "full" volunteer members are required to work as volunteer Emergency Medical Attendants for a total of 72 hours each during each three month period. As well, they are required to attend 75% of the approximately ten training sessions put on by the Association every year. At present there are approximately 35 "full" volunteer members who act as volunteer Emergency Medical attendants on a regular basis.

31. The Association operates out of a two-storey building in Nobleton known as the Hall. This building is leased by the Association from the Township of King for the nominal amount of $1.00 per year. In 1990-1991, the Hall underwent extensive renovations which were funded by a $260,000.00 grant from the Ministry of Health. The Executive of the Association developed the plans for these renovations and negotiated the construction contracts and oversaw the project on a voluntary basis and received no remuneration for

their work. The primary construction contracts were entered into among the Association, its general contractor and its architect.

32. The Association raises approximately $15,000.00 per year through various fund raising events. These funds are used to purchase extra equipment to be used in the ambulance service such as vacuum splints and pediatric immobilization devices as well as training equipment such as "CPR" (artificial respiration) mannequins and trauma dolls. In addition, the Association sponsors the participation by both volunteers and its employees in competitive events involving emergency medical attendants from other ambulance services, This includes paying for their transportation, hotels and food expenses. Equipment worth approximately $10,000.000 has been contributed to the ambulance service by the Association.

33. The Association raises some funds by providing ambulances and emergency medical attendants on a fee-for-services basis for special events such as horse shows or mail displays. When the Association uses an ambulance for such special events, it is required to pay 10% of the fee to the Ministry of Health as compensation for the use of the ambulance.

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T|0069|91-2

T/0069/91

IN THE MATTER OF AN APPLICATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union — **Applicant**

- and -

The Crown in Right of Ontario
as represented by the Ministry of Health and
Nobleton Ambulance Association — **Respondent**

BEFORE:	G. McKechnie	Vice-Chairperson
	M. Sullivan	Member
	R. Redford	Member
FOR THE APPLICANT:	S. White Counsel Gowling, Strathy & Henderson Barristers & Solilcitors	
FOR THE RESPONDENT:	H. Rolph Counsel McMillan Binch Barristers & Solicitors	
DATE OF HEARING:	October 23, 1992	

DECISION

1. By Interim Decision dated February 24, 1992, the Tribunal ordered a pre-hearing representation vote to be taken of the voting constituency set out in the application for representation rights.

2. The vote was held March 26, 1992 and the parties proceeded to a formal hearing held October 23, 1992. The Tribunal issued a decision dated January 14, 1993 and the ballots cast in the representation vote were counted January 25, 1993.

3. Having regard to the fact that more than fifty percent (50%) of the ballots cast in the representation vote were cast in favour of the Applicant, the Tribunal hereby confirms that representation rights are granted to the Applicant with respect to the bargaining unit described in paragraph 3 of the Interim Decision of the Tribunal dated July 14, 1992.

4. The Registrar is directed to destroy the ballots cast in the representation vote no earlier than thirty (30) days from the date of this decision unless representations to the contrary are received from any party.

DATED THIS 9th DAY OF FEBRUARY, 1993

Graeme H. McKechnie, Vice-Chair

M. Sullivan, Member

R. Redford, Member

Ontario Public Service
Labour Relations Tribunal

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T/0071/91

IN THE MATTER OF A COMPLAINT

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

R. LeClair/A. Czekierda

Complainants

- and -

Ontario Public Service Employees Union

Respondent

BEFORE:	G. McKechnie	Vice-Chairperson
	M. Sullivan	Member
	B. Gallivan	Member
FOR THE COMPLAINANT:	A. Czekierda	
FOR THE RESPONDENT:	D. Wright Counsel Ryder, Whitaker, Wright & Chapman Barristers & Solicitors	
HEARING:	March 3, 1992	

This matter involves a complaint pursuant to section 30 of the Crown Employees' Collective Bargaining Act, R.S.O. 1980, c. 108. The complaint was brought by Robert LeClair and Alicia Czerkierda. The hearing took place on March 3, 1992.

At the outset of the hearing, Ms. Czerkierda requested an adjournment on the basis that Mr. LeClair was out of the country and he was to present the complainant's case, not Ms. Czerkierda.

Mr. Wright, Counsel for the Union, objected to the request for the adjournment. Mr. Wright stated that Mr. LeClair did not present himself at the hearing, although by notice dated February 7, 1992 from the Registrar, he had been advised of the date of the hearing. In addition, Mr. Wright claimed that a request was made of the Complainants, by letter dated February 19, 1992, for particulars. Subsequent to the hearing into this matter, Mr. Wright informed the Tribunal that his letter dated February 19, 1992 had been returned, undelivered. Mr. Wright stated that his office had inquired into attempts made to deliver the letter and was advised that three attempts were made by priority post and when the third attempt received no answer, the letter was returned to Mr. Wright's office. Mr. Wright stated that Mr. LeClair had called his office on February 28, 1992 and requested an adjournment of another case before the Tribunal which was to be held later in March. At that time, Mr. LeClair made no mention of an adjournment of the March 3, 1992 hearing date. Mr. Wright referred the Tribunal to a decision of Jane Devlin, Vice Chairperson, dated November 7, 1990 which was a decision on a series of complaints, the first of which was James Glennie, Complainant, and Ontario Public Service Employees Union, Larry Rose, William Jobe and Robert Wilson, Respondents, (case T/0001/89).

Ms. Czerkierda stated that Mr. LeClair does the presentation of cases and that she was only his assistant. She indicated that a letter written by Mr. LeClair but signed by both she and Mr. LeClair and dated December 9, 1991 set forth the particulars of

their complaint even though Mr. Wright had argued that the Union wished to have further particulars. Ms. Czerkierda stated that she was not familiar with the process of the Tribunal and she had not contacted Mr. Wright's office regarding an adjournment until March 2, 1992. She indicated that Mr. LeClair looked after adjournments and he had not called Mr. Wright about an adjournment because of Mr. LeClair's impending holiday and that he felt that Ms. Czerkierda would able to get the adjournment. Ms. Czerkierda stated that she could not proceed on her own complaint, nor could she proceed on behalf of Mr. LeClair. Ms. Czerkierda stated that she had been out of the country until February 21, 1992 and that she had not received Mr. Wright's letter dated February 19, 1992 since it had been sent to Mr. LeClair's address which was the address on the Complaint.

The Tribunal reviewed the matter of re: James Glennie (supra), which was a case in which a first day of hearing was held February 21, 1990 and the hearing was scheduled to resume on Wednesday, October 10, 1990. Notice of the hearing was sent to the Complainants and Counsel but neither Counsel for the Complainants, nor the Complainants, attended the hearing. The Tribunal decided that without any explanation from the Complainants for the failure to attend the hearing, the complaints would be dismissed. It is the Tribunal's view that in the case of Mr. LeClair, a similar resolution to that in the Glennie case is appropriate. Mr. LeClair was advised by letter dated February 7, 1992 that the hearing was scheduled for March 3, 1992. The following note is in that notice of hearing:

> NOTE: If you do not attend at the hearing, the Tribunal may proceed in your absence and you will not be entitled to any further notice in the proceedings.

Although the Tribunal was advised by letter dated March 25, 1992

that Mr. Wright's letter dated February 19, 1992 had not been delivered to Mr. LeClair, nonetheless there was no evidence to show that Mr. LeClair was unaware of the Notice of Hearing dated February 7, 1992. Indeed, Ms. Czerkierda attended at the hearing and the Notice of Hearing for each Complainant was sent to the same address as Mr. Wright's letter dated February 19, 1992. Further, Ms. Czerkierda stated that Mr. LeClair had not called Mr. Wright because of his impending vacation and assumed that Ms. Czerkierda could get the adjournment. As a result, it is the Tribunal's view that Mr. LeClair knew of the instant hearing but disregarded his responsibility to attend at the hearing or make appropriate provisions to adjourn the hearing in a timely fashion. As a result, Mr. LeClair's complaint is dismissed on the basis that he did not attend at the hearing to present his complaint before the Tribunal.

In the matter of Ms. Czerkierda, it was the Tribunal's view that she should articulate her complaint and be prepared to proceed with the complaint on the date selected. The Tribunal recessed the hearing and gave Ms. Czerkierda approximately one hour to articulate her own complaint and provided mediation assistance for that purpose. It advised Ms. Czerkierda that if she was unable to articulate her complaint, or to proceed, the Tribunal would dismiss the complaint.

The Tribunal reconvened the hearing at 12:00 noon on March 3, 1992 and was advised by Ms. Czerkierda that she could not proceed and could not pursue her complaint. She indicated that she was therefore withdrawing her complaint without prejudice.

In conclusion, the Tribunal dismisses the complaint of Mr. LeClair and accepts Ms. Czerkierda's withdrawal of her own complaint without prejudice.

Dated at Toronto, this 10th day of June, 1992.

Graeme H. McKechnie, Vice-Chair

I concur

M. Sullivan, Member

I concur

B. Gallivan, Member

T|0074|91-1

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T/0074/91

IN THE MATTER OF AN APPLICATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario
as represented by the Ministry of Health
and Hoffman Ambulance Service Limited

Respondent

BEFORE:	G. McKechnie	Vice-Chairperson
	M. Sullivan	Member
	D. Guptill	Member
FOR THE APPLICANT:	I. Roland Counsel Gowling, Strathy & Henderson Barristers & Solicitors	
FOR THE RESPONDENT:	J. Middlebro' Counsel Middlebro', Stevens & Marsh Barristers & Solicitors	
HEARING:	May 12, 1992	

The Union filed an application for representation rights on January 24, 1992. The Reply to the application was filed by the employer February 18, 1992. A pre-hearing representation vote was ordered by Interim Decision dated March 2, 1992 and the vote was held on April 8, 1992. The Returning Officer reported that sixteen (16) people voted and there were ten (10) segregated ballots.

The Employer's reply to the Application for Representation Rights listed five (5) issues. At the Hearing, the Employer withdrew all issues save and except the question of inclusion or exclusion of employees from the bargaining unit. Briefly stated, the Respondent Employer states that all who cast ballots should be in the bargaining unit; whereas the Union claims that certain persons should not be included in the bargaining unit and their ballots should not be counted.

The Union provided the Tribunal with the following names, employment categories and <u>its</u> claim as to inclusion or exclusion.

<u>Name</u>	<u>Category</u>	<u>Inclusion</u>
Rob Wolfe	Full-Time Ambulance Attendant	Yes
Dean Boyle	All	Yes
Roy Dalton	Are	Yes
Laurie Ferguson	Regularly	Yes
Kathy Gailen	Scheduled	Yes
Bill Hoffman	Part-	Yes
Jeff Hoffman	Time	Yes
Rob Taylor	Ambulance	Yes
Rob Verberne	Attendants	Yes
Blake Smith	Part-Time but not work since September, 1991	No
Leroy Edwards	All of	No
Nan Goens	These	No
Terry Rompf	Are	No
Rob Watson	Casual	No
Doris Wragg	Employees	No
Donna Hoffman	Supervisory	No

After a review of the statements by the Complainant and Respondent, the Tribunal appoints Mr. Don Aynsley as an Inquiry Officer to examine the claims by both parties and to report back to the Tribunal. Should the parties not accept the Report of the Inquiry Officer, the Tribunal will hear arguments based on the Report of the Inquiry Officer.

Dated at Toronto, this 10th day of June, 1992.

Graeme H. McKechnie, Vice-Chair

Mike Sullivan, Member

David Guptill, Member

T/0074/91-2

Ontario Public Service Labour Relations Tribunal
Fonction publique de l'Ontario Tribunal administratif des relations de travail

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T/0074/91

IN THE MATTER OF AN APPLICATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario
as represented by the Ministry of Health
and Hoffman Ambulance Service Limited

Respondent

BEFORE:	G. McKechnie	Vice-Chairperson
	M. Sullivan	Member
	D. Guptill	Member
FOR THE APPLICANT:	S. White Counsel Gowling, Strathy & Henderson Barristers & Solicitors	
FOR THE RESPONDENT:	K. Graham Counsel Middlebro', Stevens & Marsh Barristers & Solicitors	
HEARING:	March 5, 1993	

1. By Interim Decision dated March 2, 1992, the Tribunal ordered a pre-hearing representation vote to be taken of the voting constituency set out in the application for Representation Rights.

2. The vote was held April 8, 1992. The Employer replied to the Application for Representation and raised an issue of inclusion/exclusion of certain persons from the bargaining unit. This matter was heard by the Tribunal on March 5, 1993. During the course of the hearing, the parties reached agreement that the following persons were not in the bargaining unit: Blake Smith; LeRoy Edwards; Nan Goens; Terry Romphf; Robert Watson and Doris Wragg. They also agreed that Donna Hoffman would be included in the bargaining unit. The parties agreed to an immediate counting of the ballots cast in the representation vote, with the ballots of the above six excluded people to remain segregated.

3. Having regard to the fact that more than fifty percent (50%) of the ballots cast in the representation vote were cast in favour of the Applicant, and having regard to the parties' agreement (supra-paragraph 2), the Tribunal hereby confirms that representation rights are granted to the Applicant with respect to the bargaining unit described in paragraph 3 of the Interim Decision of the Tribunal dated March 2, 1992.

4. The Registrar is directed to destroy the ballots cast in the representation vote no earlier than thirty (30) days from the date of this decision unless representations to the contrary are received from any party.

Dated at Toronto, Ontario this 31st Day of March, 1993.

Graeme H. McKechnie, Vice-Chair

M. Sullivan, Member

D. Guptill, Member

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T/0085/91

IN THE MATTER OF A COMPLAINT

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Hartley

Applicant

- and -

Ontario Public Service Employees Union

Respondent

BEFORE:	G. McKechnie	Vice-Chairperson
	M. Sullivan	Member
	D. Guptill	Member
FOR THE APPLICANT:	L. Hartley	
FOR THE RESPONDENT:	L. Steinberg Counsel Koskie & Minsky Barristers & Solicitors	
HEARING:	March 2, 1993	

Laurelle Hartley was the successful applicant in a competition for the position of Communications Operator with the Ministry of Transportation in New Liskeard, Ontario. She began working in the position on September 9, 1991. Prior to receiving this position, Ms. Hartley worked for the Ministry of the Attorney General on a contract and freelance basis.

Shortly after beginning in the position as Communications Operator, she was informed by her supervisor and two other members of management in the Ministry of Transportation that a grievance had been filed by Mr. F. Sauve, alleging that the Ministry of Transportation had erred in its selection of Ms. Hartley. She was informed that she was the third party incumbent and that the grievance would be heard before the Grievance Settlement Board. She also stated that she was advised by her supervisor that should the Grievance Settlement Board decide in favour of Mr. Sauve, placing him in the position, Ms. Hartley's employment would not be required.

Ms. Hartley stated she has been a member, in good standing, of the Ontario Public Service Employees' Union (OPSEU). She reviewed the constitution of the Union and found that Article 7.1 states that members in good standing are entitled to be represented by the Union. She approached the President of the Local Union, Mr. N. Menard, who referred her to Mr. R. Ellerton, the Union's representative located in Timmins. Ms. Hartley testified that Mr. Ellerton explained that the Grievance Settlement Board could decide in favour of the Ministry and dismiss the grievance, decide in favour of the grievor and require that the competition be redone or decide in favour of the grievor placing him directly into the position. Mr. Ellerton indicated that if the latter occurrence was the decision, Ms. Hartley would return to her old job; however, Ms. Hartley stated she told Mr. Ellerton that her old job was a contract position and as a result, she did not have access to it. Ms. Hartley also testified that Mr. Ellerton indicated that she had

the right to attend the grievance hearing but was not entitled to Union representation. Ms. Hartley asked for financial aid from the Union to retain independent legal counsel but was advised by Mr. Ellerton that the Union did not do that. In Ms. Hartley's view, Mr. Ellerton did not display a helpful attitude toward her. Ms. Hartley testified that following her conversation with Mr. Ellerton, she contacted Mr. Howard Law, who at the time was a Grievance Officer with the Union and it was Ms. Hartley's evidence that Mr. Law told her that the Union would not pay for the legal representation and that it was the Union's responsibility to look after the grievor. She testified that Mr. Law indicated that the Union's rule was that it would not pay for a third party incumbent's independent legal representation. Ms. Hartley then wrote to the President of her Union, Mr. Fred Upshaw, stating that it was her opinion that the Union's constitution required representation by the Union. She also indicated in her letter that if the arbitration board decided in favour of the grievor, she would be adversely affected and that she felt that she did not have any rights in the circumstances. Mr. Upshaw replied to her letter indicating first that the Union's constitution, specifically Article 7.1(a) regarding representation, did not apply to paid legal representation for third party incumbents in job competition grievances. Secondly, he indicated that if Ms. Hartley was displaced from her current position as a result of the Grievance Settlement Board's decision, that, ".... OPSEU will represent you in any grievance you choose to file against dismissal, even if it occurs during your probationary period." (pp 1-2 of letter dated January 20, 1992). Ms. Hartley felt that this was not a genuine offer since Article 27.8.1 of the collective agreement stated: "Any probationary employee who is dismissed or released shall not be entitled to file a grievance."

The hearing before the Grievance Settlement Board was scheduled for February 17, 1992 and was adjourned without notification to Ms. Hartley. The hearing date was then set for May 20, 1992 and it was

continued on September 22 and 23, 1992. Ms. Hartley attended at each of the hearings before the Grievance Settlement Board without legal representation and paying her own expenses. She indicated by way of background information, that she had a conversation with Mr. N. Luczay, a Grievance Officer with the Union, regarding her expenses for attendance at the hearings and felt she had an understanding that the Union would pay some of her expenses; however, Mr. Luczay informed Ms. Hartley by letter that the Union would not pay for any expenses.

In cross-examination, Ms. Hartley agreed that the letter from Mr. Upshaw stated that the Union would represent her should her job be placed in jeopardy and she lodged a grievance. She indicated that she did not feel that was a genuine offer given her interpretation of the collective agreement. In addition, Ms. Hartley complained that the Union had agreed in writing to give her information prior to the Grievance Settlement Board hearing. However, the only information she possessed was information that she had received through the Freedom of Information Act by her own efforts and it had large segments blacked out.

Ms. Hartley testified that she believed that the grievance process by which Mr. Sauve launched a grievance against the Ministry of Transportation's decision was proper, that is she was not complaining that Mr. Sauve should not have lodged the grievance, nor did she complain that the Union was wrong in taking the grievance through to the Grievance Settlement Board. She agreed that the Union was under no obligation to provide her with either legal counsel or with payment for legal counsel for the instant hearing in front of the Tribunal. In that case, it was Ms. Hartley's position that the two matters were different, since in the instant case, she had initiated the complaint, whereas in the arbitration case before the Grievance Settlement Board, she was a third party incumbent and was not asked for her opinion with respect to the grievance, nor should she have been. She testified

that she did not know, of her own knowledge, if the Union had ever paid for legal representation for third party incumbents.

Ms. Hartley's argument is that the Union has consistently put the grievor's situation or interests above that of the third party in all cases and makes no allowances for different facts and different circumstances. In her case, she found that she was possibly going to suffer the loss of her job for an error made by the Ministry of Transportation and that she felt that she should not have to be the one who bears the burden of that kind of error. It was Ms. Hartley's argument that the Union should look at each situation and decide on the merits of each case whether or not it should represent both the grievor and the third party incumbent, or at least pay for legal representation of the third party incumbent. In her view, the Union acted in a discriminatory manner because its rule discriminated against an identifiable group of individuals within the Union, that is third party incumbents in the matters of job competition cases. She believed therefore that the Union had disregarded the possible consequences to her of a finding which placed the grievor into the position in which she was now the incumbent. In Ms. Hartley's view, the grievor simply signed the grievance form and then bore no negative outcome since if the grievance failed, he was in no worse position than he had been at the outset, whereas if the grievance succeeded, he would receive the job which she now held. It was her view that the Union should look after all parties' interests at the same time.

The Union argued that the situation in this case is faced on a recurring and constant basis by Unions. There are many occasions in which the rights of two members conflict and the Union must make a choice. In the Union's view, the structure of the Crown Employees Collective Bargaining Act RSO 1980, c 108 (Act) defines the responsibility of the Union as the exclusive representative of the employees in the bargaining unit and choices often have to be made. The Union argued that the original grievance was pursued

properly and Ms. Hartley agrees with that. The difficulty is that there could be negative consequences if the Grievance Settlement Board found in favour of the grievor and put him into the position.

It is the Union's argument that once it decided to pursue the Sauve grievance before the Grievance Settlement Board, Ms. Hartley's interest and the Union's interest became adverse at arbitration and the Union is not expected or required to provide for representation or payment for representation for a position which is against the one it is advancing. The Union argued that it knew of no instance where a third party incumbent received representation by the Union that was carrying the grievance and put forward the position that it could not argue against itself and take contradictory positions. Further, the Union argued that Section 30 of the Act refers to representation of employees before the employer and not within the Union itself. Once the decision had been made to pursue the grievance of Mr. Sauve, the Union was no longer under any obligation to represent Mrs. Hartley at that point.

In support of its arguments, the Union referred the Tribunal to four decisions of the Ontario Labour Relations Board and two decisions of the Ontario Public Service Labour Relations Tribunal which are discussed below.

The Tribunal has reviewed the evidence of Ms. Hartley and the case law submitted to it. In Re: Sylvia Colalillo [1982] OLRB, Rep. July 1066, the issue was whether or not the complainant had been denied the right to stand for election to union office. The Board found that the dispute was an internal matter between the trade union and the complainant and that Section 68 of the Ontario Labour Relations Act was concerned only with representation between the trade union and the employer. The Union in the instant case argued that although the issue was not the same, the principle that representation dealt with relations between the Union as it represented an employee before the employer, was, in fact, the

same. Further, the Colalillo case also stood for the proposition that recourse must be sought within the Union's constitution rather than in the governing statute.

In Re: John Farrugia [1978] OLRB Rep. February 152, the issue was whether the Union's pursuit of a grievance to clarify the collective agreement or seek an interpretation of the collective agreement would breach that organization's duty to fairly represent the employees. The Board ruled, at p. 160, para. 42, that; a Union proceeding to arbitration is the opposite of discrimination, arbitrariness or bad faith. In Re: Maria Mlakar [1989] OLRB Rep. Dec. 1246, the issue was more closely associated with the case before the Tribunal. In the Mlakar decision, the issue was whether the Union violated Section 68 of the Ontario Labour Relations Act, which is very similar to Section 30 of the Crown Employees Collective Bargaining Act, by failing to represent the third party incumbent at a grievance hearing. The situation is almost identical to the instant case because the complainant, Maria Mlakar, was a successful candidate in a job competition and the Union proceeded to arbitration on behalf of one of its members who was not successful. In that case, the Union refused to represent the complainant during the arbitration hearing. At page 1248 of that decision, para. 12 states as follows:

> "With respect to the allegation that the Union failed to represent the complainant at the hearing of Ms. Fekete's grievance the following is clear. Unions are often placed in the position of having to deal with competing rights and interests as between individual members of the bargaining unit for which they hold bargaining rights. Invariably, there are situations where there is "discrimination" as between individuals. For example, one is discriminating in conferring a preference to one employee over another, based on seniority. It is discriminatory to confer a preference to a better qualified employee over another. However, that "discrimination" is, in and of itself, in no way improper. Choices as between individuals must be made. What gives rise to concern is where that choice is made based on arbitrary or other improper considerations.

> This Board has said on many occasions that making those difficult decisions is very much a part of the responsibility which a Union bears in the representation of employees." (p. 1248)

Further in the same decision and also in para. 12, the Board cited a passage from the Municipality of Metropolitan Toronto, [1978] OLRB Rep. Feb. 143 at paragraph 18. In part that citation is as follows:

> "The duty does not make the union the guarantor for every aggrieved employee. Instead, the duty requires that the union consider the position of all of its members and that it weigh the competing interest of minorities or individuals in arriving at its decision." (p. 1248)

At para. 13, the Board stated as follows:

> "Having undertaken to refer this grievance to arbitration, the union must represent Ms. Fekete's interest. The complainant would have the union represent her competing interest as well. Inherent in that is the requirement that the Union take inconsistent positions at the arbitration and argue against itself. The nature of the proceeding is such that it is the decision of management that is being challenged. Obviously, the complainant may be affected. But Section 68 does not make a union the guarantor for every aggrieved employee, nor does it require the Union, having made its decision as between competing interests, to support both. It properly supports the interest that it feels is consistent with the proper application and/or administration of the collective agreement. The complainant was advised by Ms. Jewett that the union would not represent her at the arbitration nor would it provide her with counsel. In so doing, the Union did not violate Section 68 of the Act." (p. 1249)

The Union also referred the Tribunal to Re: P. Holmes [1977] OLRB Rep. Apr. 211. In this case, the union pursued a grievance and the complainant objected, indicating that the union was acting in an

arbitrary manner. The Board stated at para. 14 as follows:

> "In situations such as this, where two or more employees are competing against each other for a single job vacancy, a Union is entitled to challenge those decisions of Management which it feels violates the terms of the collective agreement. However, provided the union does not act in a manner that is arbitrary, discriminatory or in bad faith it cannot be said the union has an obligation to actively pursue the grievances of every dissatisfied employee in such a situation." (p. 214)

In Re: Robert Leclair and Ontario Public Service Employees' Union, a decision of the Tribunal dated February 7, 1991, the complainant indicated that the Union did not support him in his pursuit of a complaint. The complainant indicated that he had to expend his "own time and resources" whereas the Union had "the benefit of his dues" to finance its pursuit of the matter. The Tribunal stated the union was not obliged to finance the complaint (p. 4). In a Tribunal case, Re: Robert Leclair and Ontario Public Service Employees' Union, a decision dated February 21, 1992, the same complainant stated that the Tribunal had the authority to review the collective agreement, the Union policy manual and the Union constitution. The Tribunal concluded that its jurisdiction does not extend to reviewing internal Union affairs (p. 4) and further stated that the Crown Employees Collective Bargaining Act, "... imposes no obligation on the Union to provide him with legal representation in circumstances where the Union is the respondent to the complaint." (p. 4).

A review of the evidence in the instant matter convinces the Tribunal that although Ms. Hartley feels aggrieved that she became the third party incumbent in a situation which was not of her own making, Mr. Sauve properly lodged a grievance against the decision to select Ms. Hartley for the position of Communications Operator. Ms. Hartley agrees that the grievance was appropriate and that it was appropriate for the Union to pursue the grievance. Having

admitted that, Ms. Hartley however takes this one step further and argues that the Union should either provide her with legal representation or should provide her with the financial resources to obtain independent legal representation. At the base of her complaint, is Ms. Hartley's view that in her particular situation, the potential circumstances could be that she would lose her position with the Ministry of Transportation. That may or may not be the case for all third party incumbents and she was arguing that these were special circumstances and the Union should review each and every case. The way in which a Union reviews these matters is a matter for internal Union business and the Tribunal agrees with the decision in the Leclair case (February 21, 1991) in which the Tribunal found it did not have the jurisdiction to inquire into internal Union affairs. Although the Tribunal has some sympathy for Ms. Hartley's concerns that she was an innocent party to these proceedings, nonetheless, the comments made by the Ontario Labour Relations Board in Re: Mlakar (supra) are appropriate here. The Union has the responsibility to make a decision as to which course of action to pursue. Once the Union, in this case, decided to pursue Mr. Sauve's grievance, which it did appropriately in Ms. Hartley's view, the Union could not consider Ms. Hartley's interests since they were now adverse to the interest the Union chose to pursue. The matter was squarely between the Union and the Ministry of Transportation with respect to Mr. Sauve and Ms. Hartley, as a third party incumbent, was given the right to be represented at the hearing, either by herself or by counsel. Ms. Hartley argued that the Union could pursue parallel tracks; however, in the Tribunal's view, should the Union have acceded to Ms. Hartley's request, it would not be pursuing parallel tracks, but indeed would be pursuing adverse tracks because the interests of Ms. Hartley and Mr. Sauve were opposed. The Tribunal understands that Ms. Hartley was naturally concerned about the potential negative impact of the Grievance Settlement Board decision; however, there is nothing in the Act which requires the Union to provide representation or financial compensation to

provide representation to a third party incumbent. With respect to whether or not her case was a special case and should be treated differently, this is a matter for internal Union decision making and the Tribunal has no comment to make on that matter.

Ms. Hartley indicated at the hearing that there was, in her view, an understanding that the Union might consider reimbursement for some of her expenses incurred while she attended the hearings in Toronto and North Bay. That too is a matter for internal Union decision making and not a matter properly placed before the Tribunal in this particular case.

As a result, based on the evidence and the arguments presented, the Tribunal concludes that Ms. Hartley's complaint must fail. The Union made a decision to pursue a case to arbitration and once having made that decision, Ms. Hartley's interests were adverse to the Union's interests and the Union was under no obligation, either from the Act or from a labour relations perspective, to provide legal counsel, or to provide sufficient financial resources for Ms. Hartley to employ legal counsel. It is noteworthy that in Mr. Upshaw's letter to Ms. Hartley in which he indicates that legal representation and financial compensation will not be forthcoming, he states very clearly that the Union will represent Ms. Hartley in the event that she was displaced and lodged a grievance. In other words, the Union has placed itself in writing as willing to represent Ms. Hartley in the event that she lodged a grievance. This buttresses the Tribunal's finding that the Union did not act in a manner that was discriminatory, arbitrary or bad faith in this matter. It indicated clearly that it will represent Ms. Hartley as stated in its constitution.

As a result, the complaint is dismissed.

Dated at Toronto, this 5th day of May, 1993.

Graeme H. McKechnie, Vice Chair

Michael Sullivan, Member

David Guptill, Member

Ontario Public Service Labour Relations Tribunal
Fonction publique de l'Ontario Tribunal administratif des relations de travail

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T/0088/91

IN THE MATTER OF A COMPLAINT

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

BETWEEN

Ontario Public Service Employees Union

Complainant

- and -

The Corporation of the Township of Temagami Ambulance Service

Respondent

BEFORE:	D. Stanley	Chairperson
	M. Sullivan	Member
	W. Madigan	Member

FOR THE GRIEVOR	I. Roland Counsel Gowling, Strathy & Henderson Barristers & Solicitors
FOR THE EMPLOYER	The Corporation of the Township of Temagami Ambulance Service

T/0088/91

TRIBUNAL ORDER

Enclosed is a Memorandum of Agreement which the parties agreed would be made an Order of the Tribunal.

DATED at Toronto, this 15th day of October, 1992.

D. Stanley, Vice-Chairperson

M. Sullivan, Member

W. Madigan, Member

File #T/0088/91

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

IN THE MATTER OF A COMPLAINT UNDER SECTION 32 OF THE ACT

BEFORE THE ONTARIO PUBLIC SERVICE LABOUR RELATIONS TRIBUNAL

B E T W E E N:

THE ONTARIO PUBLIC SERVICE EMPLOYEES UNION

Complainant

-and-

THE CORPORATION OF THE TOWNSHIP OF TEMAGAMI AMBULANCE SERVICE

Respondent

MEMORANDUM OF AGREEMENT

In settlement of this complaint the parties hereby agree to the following procedures for scheduling, allocating, and assigning shifts of the ambulance attendants employed by the Respondent Service as follows:

Day Shifts

1. The three permanent part-time employees (M. Ashfield, J. Mackfall and K. Buckle) shall be scheduled to work day shifts, on a rotating basis, as set out in Appendix "A" attached hereto.

2. In the event one of the permanent part-time employees does not wish to work his/her regularly scheduled day shift,

   (a) the employee may exchange his/her shift with another permanent part-time employee, provided that a shift change form is completed and submitted to the employer 48 hours or more prior to the shift that is the subject of the shift change; SUBJECT TO APPROVAL OF THE EMPLOYER.

   (b) the employee may find a casual employee who agrees to work the permanent part-time employee's day shift, provided a shift replacement form is completed and submitted to the employer 48 hours or more prior to the shift; SUBJECT TO APPROVAL OF THE EMPLOYER.

   (c) the 48 hour period required in (a) and (b) may be abridged in the case of an emergency; and

(d) the employer shall not unreasonably withhold consent to a shift change or shift replacement request in accordance with this paragraph.

3. In the event a permanent part-time employee, or ~~Murray Dunn,~~ the full-time employee supervisor, is unable to work a regularly scheduled shift because of illness, injury, scheduled vacation, or required absence, the shift shall first be offered to ~~the permanent part-time employees, and in the event the permanent part-time employees do not accept the shift it will be offered to the casual employees.~~ ON A FIRST AVAILABLE BASIS The regular day shift schedule will be changed only to accommodate a shift absence of Murray Dunn in the event no employee accepts Murray Dunn's shift.

4. It is understood and agreed that the "normal" hours of work of a permanent part-time employee is that employee's regularly scheduled day shifts, and a day shift otherwise worked by a permanent part-time employee is not part of that employee's "normal" hours of work.

<u>On-Call Shifts</u>

5. The employer shall provide an on-call shift availability form covering a period of 4 weeks to each of the permanent part-time and casual employees of the Service. This form shall be given to the employees at least 5 weeks prior to the start of the 4-week

PRIOR TO THE TERMINATION OF THE SCHEDULE TO SCHEDULE THE ON-CALL FOR THE NEXT 4 WEEKS.

period covered by the form. The form shall indicate the day shifts scheduled for the permanent part-time employees in accordance with paragraph 1. Attached hereto as Appendix "B" is a sample on-call shift availability form.

6. Each employee shall return the on-call shift availability form to the employer within 7 days. The employee shall indicate on the form those on-call shifts for which he/she is available to be scheduled for work.

7. The three permanent part-time employees shall have the first choice to be scheduled to work all of the on-call shifts beginning from the on-call shift immediately following the employee's first regularly scheduled day shift, to the on-call shift immediately following the employee's last regularly scheduled day shift.

8. In the event a permanent part-time employee ~~declines to be~~ REQUEST NOT TO BE scheduled to work one or more on-call shifts referred to in paragraph 7, AND THE EMPLOYER AGREES these shift(s) shall be available first to the casual employees as scheduled on-call shifts, and then to the other permanent part-time employees.

9. In the event the casual employees and the other permanent part-time employees decline to be scheduled on an on-call shift(s) normally associated with the regularly scheduled day shifts of permanent part-time employees, as set out in paragraph 7, the

permanent part-time employee scheduled to work the regularly scheduled day shift shall be scheduled for the on-call shift(s).

10. Three weeks or more prior to the commencement of the 4-week shift schedule the employer shall provide all the employees with a copy of the shift schedule.

11. In the event that an employee does not wish to work his/her scheduled on-call shift, that employee may arrange with another employee who agrees to work the on-call shift, provided a shift replacement form is completed and submitted to the employer 48 hours or more prior to the shift. SUBJECT TO APPROVAL OF THE EMPLOYER.

12. The 48 hour period required in paragraph 11 may be abridged in the case of an emergency, and the employer shall not unreasonably withhold consent to shift a replacement request in accordance with paragraph 11.

13. In the event an employee is unable to work a scheduled on-call shift because of illness, injury, or required absence, the on-call shift ~~shall first be offered to the permanent part-time employees, and in the event the permanent part-time employees do not accept the shift, it will be offered to the casual employees.~~ SHALL BE OFFERED ON A FIRST COME/FIRST SERVED BASIS.

14. This settlement shall be submitted to the Tribunal to be made an Order of the Tribunal. It is without prejudice or precedent to the rights of the parties to collective bargain those issues in the current collective bargaining between the parties.

DATED this day of April, 1992.

for The Ontario Public Service Employees Union

for The Corporation of the Township of Temagami Ambulance Service

APPENDIX "A"

Day Shift Rotation Schedule

For the purpose of the day shift rotation schedule, the week is Monday to Sunday.

On the following schedule "M.D." stands for Murray Dunn, who is scheduled to work five days of the week, excluding Saturday and Sunday.

Numbers "1", "2" and "3" each represent one of the three permanent part-time employees.

The weekly schedules are on the following rotation:

		Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
Week 1	Day Shift 9 a.m. - 5 p.m.	M.D. 3	M.D. 1	M.D. 1	M.D. 1	M.D. 2	2 3	2 3
Week 2	"	M.D. 2	M.D. 3	M.D. 3	M.D. 3	M.D. 1	1 2	1 2
Week 3	"	M.D. 1	M.D. 2	M.D. 2	M.D. 2	M.D. 3	3 1	3 1
Week 4	"	M.D. 3	M.D. 1	M.D. 1	M.D. 1	M.D. 2	2 3	2 3

On-Call Shift Availability Form

	M	T	W	T	F	S	S	M	T	W	T	F	S	S
NAME:														
DATE:														
ON CALL 1:00 a.m. to 9:00 a.m.														
DAY SHIFT 9:00 a.m. to 5:00 p.m.														
DAY SHIFT 9:00 a.m. to 5:00 p.m.														
ON CALL 5:00 p.m. to 1:00 a.m.														

	M	T	W	T	F	S	S	M	T	W	T	F	S	S
NAME:														
DATE:														
ON CALL 1:00 a.m. to 9:00 a.m.														
DAY SHIFT 9:00 a.m. to 5:00 p.m.														
DAY SHIFT 9:00 a.m. to 5:00 p.m.														
ON CALL 5:00 p.m. to 1:00 a.m.														

UK:

(✓) FOR AVAILABILITY
(X) NOT AVAILABLE

TOTAL P.11

Ontario Public Service
Labour
Relations
Tribunal

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T/0093/91

IN THE MATTER OF AN APPLICATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE LABOUR RELATIONS TRIBUNAL

Between:

Ontario Public Service Employees Union

Applicant

- and -

The Crown in Right of Ontario
as represented by the Ministry of Health
and the Municipality of Cosby-Mason
& Martland-Noelville Ambulance Service

Respondent

BEFORE:	G. McKechnie	Vice-Chairperson
	M. Sullivan	Member
	B. Gallivan	Member
FOR THE APPLICANT:	E. Ogibowski Representative Ontario Public Service Employees Union	
FOR THE RESPONDENT:	K. Guy Town Clerk The Municipality of Cosby-Mason & Martland-Noelville Ambulance Service	

DECISION

1. By Interim Decision dated April 29, 1992, the Tribunal ordered a pre-hearing representation vote to be taken of the voting constituency set out in the application for Representation Rights.

2. The vote was held May 13, 1992 and the parties agreed to and signed a waiver of a formal hearing. The parties also agreed to an immediate counting of the ballots cast in the representation vote.

3. Having regard to the fact that more than fifty percent (50%) of the ballots cast in the representation vote were cast in favour of the Applicant, and having regard to the fact that the parties agreed to and signed the waiver, the Tribunal hereby confirms that representation rights are granted to the Applicant with respect to the bargaining unit described in paragraph 3 of the Interim Decision of the Tribunal dated April 29, 1992.

4. The Registrar is directed to destroy the ballots cast in the representation vote no earlier than thirty (30) days from the date of this decision unless representations to the contrary are received from any party.

DATED THIS 22nd DAY OF JUNE, 1992

Graeme H. McKechnie, Vice-Chair

Member, M. Sullivan

Member, B. Gallivan